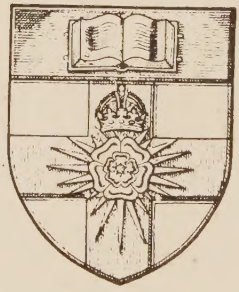
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346·4 Mx. North



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1899_2

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—MONTAGUE CRACKANTHORPE, Esq., Q.C.
Vice-Chairman—F. A. BOSANQUET, Esq., Q.C.

EX-OFFICIO MEMBERS.

SIR RICHARD E. WEBSTER, Bart., G.C.M.G., M.P.	ATTORNEY-GENERAL.
SIR ROBERT B. FINLAY, Knt., M.P. . .	SOLICITOR-GENERAL.
H. MANISTY, Esq., President of the Incorporated Law Society.	

ELECTED MEMBERS.

MONTAGUE CRACKANTHORPE, Esq., Q.C. W. C. RENSHAW, Esq., Q.C.	Lincoln's Inn.
F. A. BOSANQUET, Esq., Q.C. M. C. BUSZARD, Esq., Q.C.	Inner Temple.
C. M. WARMINGTON, Esq., Q.C. A. T. LAWRENCE, Esq., Q.C.	Middle Temple.
JAMES MULLIGAN, Esq., Q.C. J. C. LEWIS COWARD, Esq.	Gray's Inn.
W. ENGLISH HARRISON, Esq., Q.C., of the Middle Temple. ROBERT F. NORTON, Esq., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
JOHN HOLLAMS, Esq. (Firm—Messrs. Hollams, Sons, Coward & Hawksley), 30, Mincing Lane, E.C. E. J. BRISTOW, Esq. (Firm—Messrs. Wilson, Bristows & Carpmael), 1, Copthall Buildings, E.C.	Incorporated Law Society.

Secretary—PATRICK F. EVANS, Esq., 10 Old Square, Lincoln's Inn.

1899.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	W. WORSLEY KNOX, G. I. FOSTER COOKE, W. LLOYD CABELL,	*Barristers-at-Law.*
Mr. Justice North	W. LLOYD CABELL, D. PITCAIRN, H. C. ROPER,	*Barristers-at-Law.*
Mr. Justice Stirling	G. A. STREETEN, H. B. HEMMING,	*Barristers-at-Law.*
Mr. Justice Kekewich	C. C. M. DALE, G. R. ALSTON,	*Barristers-at-Law.*
Mr. Justice Byrne	GEORGE MURRAY, W. COWELL DAVIES,	*Barristers-at-Law.*
Mr. Justice Cozens-Hardy	H. L. FRASER, FRANK EVANS,	*Barristers-at-Law.*
Mr. Justice Wright (COMPANY CASES)	FRANK EVANS,	*Barrister-at-Law.*

1899.—VOL. II.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

BIBL. LONDIN UNIV.

Earl of Halsbury	*Lord Chancellor.*
Lord Russell of Killowen	*Lord Chief Justice of England.*
Sir Nathaniel Lindley	*Master of the Rolls.*
Sir Francis Henry Jeune	*President of the Probate, Divorce, and Admiralty Division.*
Sir A. L. Smith	*Lords Justices of the Court of Appeal.*
Sir John Rigby	
Sir Richard Henn Collins	
Sir Roland Vaughan Williams	
Sir Robert Romer	
Sir Ford North	*Justices of High Court, attached to Chancery Division.*
Sir James Stirling	
Sir Arthur Kekewich	
Sir E. W. Byrne	
Sir H. H. Cozens-Hardy	
Sir Robert S. Wright	*Attached to Chancery Division for Company Cases.*
Sir Richard E. Webster	*Attorney-General.*
Sir Robert B. Finlay	*Solicitor-General.*

ERRATA ET ADDENDA.

Page	*Line*	*For*	*Read*
141	3	assigned	resigned.
153	8	*Add* "*Upjohn, Q.C.,*" as Counsel for the Plaintiffs.	
260	foot-note	*Trinidad Asphalt Co.* v. *Ambard* is now reported [1899] A. C. 594.	
337	15	remainderman	tenant for life.
486	12 (from bottom)	plaintiff	company.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 2 1899, will be as follows:—

In the First Series,
[1899] 1 Ch. [1899] 2 Ch.

In the Second Series,
[1899] 1 Q. B. [1899] 2 Q. B. [1899] P.

In the Third Series,
[1899] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Abrahams and Blaiberg, *In re* – 340
African Gold Concessions and Development Company, *In re.* Markham and Darter's Case (C.A.) 480
Albion (Transvaal) Gold Mines, Limited, Transvaal Exploring Company, Limited *v.* – – 370
Aldis *v.* London Corporation – 169
Alexander *v.* Automatic Telephone Company – – – 302
Allen *v.* Gold Reefs of West Africa, Limited – – – 40
Ambard, Trinidad Asphalt Company *v.* – – – 260, n.
Anthony Birrell Pearce & Co., *In re.* Doig *v.* Anthony Birrell Pearce & Co. – – 50

PAGE

Anthony Birrell Pearce & Co., Doig *v.* Groos *v.* Anthony Birrell Pearce & Co. *In re* Anthony Birrell Pearce & Co. – – – – – 50
Atherton, Mostyn *v.* – – 360
Atkinson, *In re.* Waller *v.* Atkinson – – (C.A.) 1
———, Waller *v.* *In re* Atkinson – – (C.A.) 1
Automatic Telephone Company, Alexander *v.* – – – 302

B.

Baird's Case. *In re* Bangor and North Wales Mutual Marine Protection Association – – 593

PAGE

Bangor and North Wales Mutual Marine Protection Association, *In re.* Baird's Case – – 593
Baring-Gould *v.* Sharpington Combined Pick and Shovel Syndicate – – (C.A.) 80
Barnard and Wallis' Contract, *In re* – – – – 515
Barron *v.* Willis – – – 578
Bath and Wells (Bishop), *In re* 138
Bew *v.* Bew – – (C.A.) 467
Blackburn (W.) & Co., *In re.* Buckley's Case – – – 725
Blaiberg and Abrahams, *In re* – 340
Bland, *In re.* Miller *v.* Bland – 336
——, Miller *v.* *In re* Bland – 336
Blandy-Jenkins *v.* Dunraven (Earl) – – (C.A.) 121
Borax Co., *In re.* Foster *v.* Borax Co. – – – – 130
——, Foster *v.* *In re* Borax Co. – – – – 130
Boyes, Johnston *v.* – – – 73
Briggs *v.* Ryan. *In re* Wheeler's Settlement Trusts – – 717
Bristol Tramways and Carriage Company *v.* National Telephone Company – – – 282
British Gold Fields of West Africa, *In re* – (C.A.) 7
Brown *v.* Dunstable Corporation 378
Buckley's Case. *In re* Blackburn (W.) & Co. – – – 725
Burdett-Coutts *v.* True Blue (Hannan's) Gold Mine (C.A.) 616
Butt *v.* Wright. *In re* Maddock – – – – – 588

C.

Charnock *v.* Court – – – 35
Clanmorris (Lord), Thomson *v.* 523
Consolidated Exploration and Finance Company, *In re* – 599
Cooper *v.* Gjers. *In re* Gjers – 54
Coote *v.* Ford – (C.A.) 93
Cornwall *v.* Henson – – 710
Court, Charnock *v.* – – 35
Cowen *v.* Truefitt, Limited (C.A.) 309
Crompton & Co., Johnstone *v.* – 190

D.

PAGE

Day *v.* Singleton – – (C.A.) 320
De Cetto *v.* Hope. *In re* Hope (C.A.) 679
Dixon, *In re.* Heynes *v.* Dixon 561
——, Heynes *v.* *In re* Dixon 561
Doig *v.* Anthony Birrell Pearce & Co. *In re* Anthony Birrell Pearce & Co. – – – 59
Doman, Haynes *v.* – (C.A.) 13
Dunraven (Earl), Blandy-Jenkins *v.* – – (C.A.) 121
Dunstable Corporation, Brown *v.* 378

E.

Ecclesiastical Commissioners *v.* Pinney – – – – 729

F.

Fitzhardinge (Lord), Gifford (Lord) *v.* – – – – 32
Foad, Lilley *v.* *In re* Hale (C.A.) 107
Ford, Coote *v.* – (C.A.) 93
Foster *v.* Borax Co. *In re* Borax Co. – – – – 130
Freeman *v.* Laing – – – 355
Friary Holroyd and Healey's Breweries, Limited *v.* Singleton (C.A.) 261
Frost (S.) & Co., Limited, *In re* (C.A.) 207

G.

Gibbs, National Society for the Distribution of Electricity by Secondary Generators *v.* – 289
Gifford (Lord) *v.* Fitzhardinge (Lord) – – – – 32
Gjers, *In re*, Cooper *v.* Gjers – 54
——, Cooper *v.* *In re* Gjers – 54
Gold Reefs of West Africa, Limited, Allen *v.* – – 40
Green, Walters *v.* – – – 696
Groos *v.* Anthony Birrell Pearce & Co. *In re* Anthony Birrell Pearce & Co. – – – 50

PAGE

Gwyrfai District Council, Roberts v. – – – (C.A.) 608

H.

Hague and Hollis' Hospital's (Trustees of) Contract, *In re* 540
Hale, *In re*. Lilley *v.* Foad (C.A.) 107
Hartley *v.* Maddocks – – 199
Haynes *v.* Doman – (C.A.) 13
Henson, Cornwall *v.* – – 710
Heynes *v.* Dixon. *In re* Dixon 561
Hills, Sixth West Kent Mutual Building Society *v.* – – 60
Hinton, Oliver *v.* – (C.A.) 264
Hollis' Hospital (Trustees of) and Hague's Contract, *In re* 540
Hope, *In re*. De Cetto *v.* Hope (C.A.) 679
——, De Cetto *v.* *In re* Hope (C.A.) 679
Hope's Settlement, *In re* – 691, n.

J.

Johnston *v.* Boyes – – – 73
Johnstone *v.* Crompton & Co. – 190
Jordeson *v.* Sutton, Southcoates and Drypool Gas Company (C.A.) 217
Jubilee (1897) Sites Syndicate, *In re* – – – – 204

K.

Kelcey, *In re*. Tyson *v.* Kelcey 530
———, Tyson *v.* *In re* Kelcey 530
King, South African Breweries, Limited *v.* – – – 173
Kingsbury *v.* Walter. *In re* Moss – – (C.A.) 314
Kydd, Royal General Theatrical Fund Association *v.* *In re* Lacy – – – – 149

L.

Lacy, *In re*. Royal General Theatrical Fund Association *v.* Kydd – – – – 149

PAGE

Lagunas Nitrate Company *v.* Lagunas Syndicate (C.A.) 392
Lagunas Syndicate, Lagunas Nitrate Company *v.* (C.A.) 392
Laing, Freeman *v.* – – – 355
Lane, Walter *v.* – (C.A.) 749
Lilley *v.* Foad. *In re* Hale (C.A.) 107
Llandudno Urban Council *v.* Woods – – – – 705
London and Midland Bank *v.* Mitchell – – – – 161
London Corporation, Aldis *v.* – 169

M.

Maddock, *In re*. Butt *v.* Wright 588
Maddocks, Hartley *v.* – – 199
Markham and Darter's Case. *In re* African Gold Concessions and Development Company (C.A.) 480
Maryon-Wilson, *In re*. Wilson *v.* Maryon-Wilson – – 489
———, Wilson *v.* *In re* Maryon-Wilson – – – 489
Maynard's Settled Estate, *In re* 347
Meakin, Stock *v.* – – – 496
Miller *v.* Bland. *In re* Bland – 336
Mitchell, London and Midland Bank *v.* – – – – 161
Moss, *In re*. Kingsbury *v.* Walter – – (C.A.) 314
Mostyn *v.* Atherton – – 360
Munton, Twickenham Urban Council *v.* – – (C.A.) 603
Mutton *v.* Peat – – – 556

N.

National Bank of Wales, Limited, *In re*. – – – (C.A.) 629
National Society for the Distribution of Electricity by Secondary Generators *v.* Gibbs 289
National Stores, Limited, *In re* 773
National Telephone Company, Bristol Tramways and Carriage Company *v.* – – 282

O.

PAGE

O'Hagan, Viditz *v.* – – – 569
Oliver *v.* Hinton – (C.A.) 264

P.

Peat, Mutton *v.* – – – 556
Pinney, Ecclesiastical Commissioners *v.* – – – – 729
Price, Stoke Parish Council *v.* 277
Printers and Transferrers Amalgamated Trades Protection Society, *In re* – – – 184

R.

Rew, *In re*. *In re* Sharland. Rew *v.* Wippell – – – 536
—— *v.* Wippell. *In re* Sharland. *In re* Rew – – – – 536
Robert Watson & Co., Limited, *In re* – – – – 509
Roberts *v.* Gwyrfai District Council – – (C.A.) 608
Royal General Theatrical Fund Association *v.* Kydd. *In re* Lacy – – – – 149
Ryan, Briggs *v.* *In re* Wheeler's Settlement Trusts – – 717

S.

Santley *v.* Wilde – (C.A.) 474
Sharland, *In re*. *In re* Rew. Rew *v.* Wippell – – – 536
Sharpington Combined Pick and Shovel Syndicate, Baring-Gould *v.* – – (C.A.) 80
Shove, Sixth West Kent Mutual Building Society *v.* – 64, n.
Singleton, Day *v.* – (C.A.) 320
————, Friary Holroyd and Healey's Breweries, Limited *v.* (C.A.) 261
Sixth West Kent Mutual Building Society *v.* Hills – – 60

v. Shove – – – – 64, n.
South African Breweries, Limited *v.* King – – – – 173
Stock *v.* Meakin – – – 496
Stoke Parish Council *v.* Price – 277
Sutton, Southcoates and Drypool Gas Company, Jordeson *v.* (C.A.) 217

T.

Thomson *v.* Clanmorris (Lord) 523
Transvaal Exploring Company, Limited *v.* Albion (Transvaal) Gold Mines, Limited – – 370
Trinidad Asphalt Company *v.* Ambard – – – 260, n.
True Blue (Hannan's) Gold Mine, Burdett-Coutts *v.* (C.A.) 616
Truefitt, Limited, Cowen *v.* (C.A.) 309
Turney, *In re*. Turney *v.* Turney (C.A.) 739
——— *v.* Turney. *In re* Turney (C.A.) 739
Twickenham Urban Council *v.* Munton – – (C.A.) 603
Tyson *v.* Kelcey. *In re* Kelcey 530

V.

Viditz *v.* O'Hagan – – – 569

W.

Waller *v.* Atkinson. *In re* Atkinson – – – (C.A.) 1
Wallis and Barnard's Contract, *In re* – – – – 515
Walter, Kingsbury *v.* *In re* Moss – – – (C.A.) 314
——— *v.* Lane – (C.A.) 749
Walters *v.* Green – – – 696
Wheeler's Settlement Trusts, *In re*. Briggs *v.* Ryan – 717
Wilde, Santley *v.* – (C.A.) 474
Willis, Barron *v.* – – – 578
Wilson *v.* Maryon-Wilson. *In re* Maryon-Wilson – – – 489
Wippell, Rew *v.* *In re* Sharland. *In re* Rew – – – – 536
Woods, Llandudno Urban Council *v.* – – – – – 705
Wright, Butt *v.* *In re* Maddock 588

TABLE OF CASES CITED.

A.

		PAGE
Aaron's Reef *v.* Twiss	[1896] A. C. 273	408
Abernethy *v.* Hutchinson	3 L. J. (Ch.) (N.S.) 209; 1 H. & T. 28	751
Acton *v.* Blundell	12 M. & W. 324	230
Adam *v.* Newbigging	13 App. Cas. 308	408
Adams and Kensington Vestry, In re	27 Ch. D. 394	262
Agra Bank *v.* Barry	L. R. 7 H. L. 135	266
Ailesbury's (Marquis) Settled Estates, In re	[1892] 1 Ch. 506	684
Ainley *v.* Kirkheaton Local Board	60 L. J. (Ch.) 734	378
Alexander *v.* Mackenzie	9 D. 748	766
Allcard *v.* Skinner	36 Ch. D. 145	584
Allen, In re	W. N. (1881) 6; 29 W. R. 480	317
—— *v.* Flood	[1898] A. C. 1	699
Almada and Tirito Company, In re	38 Ch. D. 415	210, 374
Ambition Investment Building Society, In re	[1896] 1 Ch. 89	67
Ambrose Lake Tin and Copper Mining Company, In re	14 Ch. D. 390	443
Amos *v.* Smith	1 H. & C. 238	562
Andrews *v.* Gas Meter Company	[1897] 1 Ch. 361	43, 64
Anglesea Colliery Company, In re	L. R. 1 Ch. 555	596
Ashhurst *v.* Mason	L. R. 20 Eq. 225	644
Ashmore's Trusts, In re	L. R. 9 Eq. 99	743
Aspden *v.* Seddon	1 Ex. D. 496.	547
Aspinall *v.* Duckworth	35 Beav. 307.	316
Attorney-General *v.* Acton Local Board	22 Ch. D. 221	378
—— *v.* Clerkenwell Vestry	[1891] 3 Ch. 527	378
—— *v.* Dorking Union	20 Ch. D. 595	383
—— *v.* Gas Light and Coke Company	7 Ch. D. 217.	228
—— *v.* Leeds Corporation	L. R. 5 Ch. 583	228
—— *v.* Pyle	1 Atk. 435	547
—— *v.* Richmond	L. R. 2 Eq. 306	384
—— *v.* Wright	[1897] 2 Q. B. 318	707
Atwool *v.* Merryweather	L. R. 5 Eq. 464, n.	305
Aveling *v.* Knipe	19 Ves. 441	300
Avery *v.* Langford	Kay, 663	16
Axford *v.* Reid	22 Q. B. D. 548	720
Ayr Harbour Trustees *v.* Oswald	8 App. Cas. 623	224

B.

		PAGE
Backhouse *v.* Bonomi	9 H. L. C. 503	230
Badische Anilin und Soda Fabrik *v.* Schott, Segner & Co.	[1892] 3 Ch. 447	15
Baggett *v.* Meux	1 Coll. 138	721
Bagot *v.* Bagot	32 Beav. 509.	349
Baikie *v.* Chandless	3 Camp. 17	407
Bailey *v.* Barnes	[1894] 1 Ch. 25	360
Bain *v.* Fothergill	L. R. 7 H. L. 158	320
Bainbrigge *v.* Browne	18 Ch. D. 188	583
Baines *v.* Geary	35 Ch. D. 154	22
Baird's Case	L. R. 5 Ch. 725	43
Baker *v.* Bradley	7 D. M. & G. 597	586
—— *v.* Stephens	L. R. 2 Q. B. 523	86
Ballard *v.* Tomlinson	29 Ch. D. 115	233
Banks *v.* Manchester	128 U. S. 244	752
Baring, In re	[1893] 1 Ch. 61	57
Barker, In re	[1892] 2 Ch. 491	157
Barnard *v.* Tomson	[1894] 1 Ch. 374	64
Barnes *v.* Glenton	[1899] 1 Q. B. 885	165
Barrell, Ex parte	L. R. 10 Ch. 512	713
Barrow *v.* Barrow	4 K. & J. 409	573
Batthyany *v.* Walford	36 Ch. D. 269	408
Bayly *v.* Went	51 L. T. 764	111
Beaumont's Settled Estates, In re	58 L. T. 916	684
Beckett *v.* Tasker	19 Q. B. D. 7	718
Beddoe, In re	[1893] 1 Ch. 547	469
Belding *v.* Read	3 H. & C. 955	531
Bennet *v.* Batchelor	1 Ves. 63	159
Berdan *v.* Greenwood	3 Ex. D. 251.	96
Bermondsey Vestry *v.* Brown	L. R. 1 Eq. 204	278
Bettesworth and Richer, In re	37 Ch. D. 535	500
Betty, In re	[1899] 1 Ch. 821	54
Bidder *v.* Bridges	26 Ch. D. 1	52
Biggs *v.* Hoddinott	[1898] 2 Ch. 307	474
Bills *v.* Smith	34 L. J. (Q.B.) 68	726
Birch *v.* Ellames	2 Anstr. 427	271
Birmingham Corporation *v.* Allen	6 Ch. D. 284.	231
—— *v.* Baker	17 Ch. D. 782	502
Birmingham, Dudley and District Banking Company *v.* Ross.	38 Ch. D. 295	230
Black *v.* Ballymena Township Commissioners	17 L. R. Ir. 459	363
Bloxam *v.* Metropolitan Railway Company	L. R. 3 Ch. 337	670
Bluck, Re	57 L. T. 419.	9
Blumberg *v.* Life Interests and Reversionary Securities Corporation	[1897] 1 Ch. 171; [1898] 1 Ch. 27	75
Blundell *v.* Catterall	5 B. & Al. 268	705
Bolton *v.* Natal Land and Colonization Company	[1892] 2 Ch. 124	658
Bonafous *v.* Rybot	3 Burr. 1370	562
Bonnard *v.* Perryman	[1891] 2 Ch. 269	52
Bonomi *v.* Backhouse	E. B. & E. 622	235
Boor, In re	40 Ch. D. 572	500
Boucicault *v.* Chatterton	5 Ch. D. 267.	765
Bowen, In re	[1893] 2 Ch. 491	547
Bowling and Welby's Contract, In re	[1895] 1 Ch. 663	42

		PAGE
Boyd, Ex parte	21 Q. B. D. 264	718
Bradford Corporation *v.* Pickles	[1895] A. C. 587; [1894] 3 Ch. 53	223, 252
Bradley *v.* Riches	9 Ch. D. 189	357
Brett *v.* Monarch Investment Building Society	[1894] 1 Q. B. 367	67
Bridgman *v.* Green	2 Ves. Sen. 627	583
Bristow *v.* Cormican	3 App. Cas. 641	124
British and American Trustee and Finance Corporation *v.* Couper	[1894] A. C. 399	44
British Seamless Paper Box Company, In re	17 Ch. D. 467	428
Brocklehurst *v.* Jessop	7 Sim. 438	165
Brook *v.* Turner	2 Mod. 170	3
Brooksbank *v.* Smith	2 Y. & C. Ex. 58	155
Broomfield *v.* Williams	[1897] 1 Ch. 602	230
Brown *v.* Dale	9 Ch. D. 78	187
——— *v.* Stedman	44 W. R. 458	267
Browne *v.* La Trinidad	37 Ch. D. 1	84
——— *v.* London Necropolis and National Mausoleum Company	6 W. R. 188	262
Brownlie *v.* Campbell	5 App. Cas. 925	408
——— *v.* Russell	8 App. Cas. 235	69
Bruce (Lord Henry) *v.* Ailesbury (Marquess)	[1892] A. C. 356	146, 684
Buck, In re	[1896] 2 Ch. 727	154
Bunting *v.* Hicks	70 L. T. 455	363
Burkinshaw *v.* Nicolls	3 App. Cas. 1004	263
Burnaby *v.* Equitable Reversionary Interest Society	28 Ch. D. 416	573
Burrell *v.* Egremont (Earl)	7 Beav. 205	34
Butt's Case	7 Rep. 23 a	201
Butterworth *v.* Robinson	5 Ves. 709	751

C.

Cabot *v.* Kingman	166 Mass. Rep. 403	235
Caird *v.* Sime	10 App. Cas. 326	751
Campbell *v.* Wardlaw	8 App. Cas. 641	350
Carlill *v.* Carbolic Smoke Ball Company	[1893] 1 Q. B. 256	73
Carling's Case	1 Ch. D. 115	374
Carter *v.* Carter	3 K. & J. 617	272
——— *v.* Rigby & Co.	[1896] 2 Q. B. 113	699
Cary *v.* Longman	1 East, 358	752
Castle Bytham (Vicar), Ex parte	[1895] 1 Ch. 348	138
Cato *v.* Thompson	9 Q. B. D. 616	518
Caton *v.* Rideout	1 Mac. & G. 599	565
Catt *v.* Tourle	L. R. 4 Ch. 654	16
Chamberlaine *v.* Turner	Cro. Car. 129	310
Chaplin's Trusts, In re	33 L. J. (Ch.) 183	317
Charles *v.* Finchley Local Board	23 Ch. D. 767	378
——— *v.* Jones	33 Ch. D. 80	467
Charnock *v.* Court	[1899] 2 Ch. 35	703
Chasemore *v.* Richards	7 H. L. C. 349	225, 363
Chennell, In re	8 Ch. D. 492	467
Chesman *v.* Nainby	2 Ld. Raym. 1456; 2 Str. 739; 1 Bro. P. C. 234	22
Chinnery *v.* Evans	11 H. L. C. 115	111

		PAGE
Cholmondeley *v.* Clinton	2 Jac. & W. 1	162
Churcher *v.* Martin	42 Ch. D. 312	155
City and County Investment Company, In re	13 Ch. D. 475	622
City of Manchester, The	5 P. D. 221	467
Civil, Naval and Military Outfitters, In re	[1899] 1 Ch. 215	774
Clark *v.* Phillips	17 Jur. 886	316
Clarke, In re	36 Ch. D. 348	531
Clavering *v.* Clavering	2 P. Wms. 388	350
Clayton's Case	1 Mer. 572	556
Clowes *v.* Staffordshire Potteries Waterworks Company	L. R. 8 Ch. 125	228
Cockle *v.* Treacy	[1896] 2 I. R. 267	469
Collins *v.* Collins	2 My. & K. 703	337
Colyer *v.* Finch	5 H. L. C. 905	273
Concha *v.* Murrieta	40 Ch. D. 543	408
Conlan's Estate, In re	29 L. R. Ir. 199	165
Cook *v.* Fowler	L. R. 7 H. L. 27	565
Coolgardie Consolidated Gold Mines, In re	14 Times L. R. 277	370
Cooper *v.* Cooper	13 App. Cas. 88	569
——— *v.* Macdonald	7 Ch. D. 288	719
——— *v.* Wandsworth Board of Works	14 C. B. (N.S.) 180	603
Cornish *v.* Abington	4 H. & N. 549	262
Cory Brothers & Co. *v.* Owners of Turkish Steamship "Mecca"	[1897] A. C. 286	558
Cotton *v.* Imperial and Foreign Agency and Investment Corporation	[1892] 3 Ch. 454	85, 133
Courtenay *v.* Williams	3 Hare, 539	163
Courtier, In re	34 Ch. D. 136	56
Cousins, In re	31 Ch. D. 671	266, 357
Cowley (Earl) *v.* Wellesley	35 Beav. 635; L. R. 1 Eq. 656	349
Crosbie *v.* Took	1 My. & K. 431	262
Cunnack *v.* Edwards	[1895] 1 Ch. 489; [1896] 2 Ch. 679	149, 184, 186
Cunningham *v.* Foot	3 App. Cas. 974	157

D.

Dacre *v.* Patrickson	1 Dr. & Sm. 182	159
Dalton *v.* Angus	6 App. Cas. 740	230
Darnley (Earl) *v.* London, Chatham and Dover Railway Company	L. R. 2 H. L. 43	262
Davey *v.* Shannon	4 Ex. D. 81	16
Davidson *v.* Wheelock	27 Federal Reporter, 61	752
Davis, In re	[1891] 3 Ch. 119	158
Davison *v.* Gillies	16 Ch. D. 347, n.	660
Day *v.* Trig	1 P. Wms. 386	312
Dendy *v.* Henderson	11 Ex. 194	16
Denham & Co., In re	25 Ch. D. 752	654
Dent *v.* London Tramways Company	16 Ch. D. 344	655
D'Epineuil (Count), In re	20 Ch. D. 758	531
Derry *v.* Peek	14 App. Cas. 337	436, 662
Dewar *v.* Brooke	14 Ch. D. 529	743
De Witte *v.* Addison	80 L. T. 207	584
Dibbins *v.* Dibbins	[1896] 2 Ch. 348	262
Dickson *v.* Harrison	9 Ch. D. 243	775
Dinn *v.* Grant	5 De G. & Sm. 451	715

		PAGE
Dodsley *v.* M'Farquhar	Mor. Dict. 8308	770
Doe *v.* Galloway	5 B. & Ad. 43	310
—— *v.* Harris	16 M. & W. 517	156
—— *v.* Wrighte	2 B. & Al. 710	156
Dowell *v.* Dew	1 Y. & C. Ch. 345	733
Drakeford *v.* Drakeford	33 Beav. 43	317
Drincqbier *v.* Wood	[1899] 1 Ch. 393	700
Dubowski & Sons *v.* Goldstein	[1896] 1 Q. B. 478	15
Dudden *v.* Clutton Union	1 H. & N. 627	360
Dunlop, In re	21 Ch. D. 583	559
Dunn *v.* Flood	25 Ch. D. 629; 28 Ch. D. 586	540, 554
Dunne *v.* English	L. R. 18 Eq. 524	405

E.

Ebbw Vale Steel, Iron and Coal Company, In re	4 Ch. D. 827	660
Eccles *v.* Mills	[1898] A. C. 360	57
Edward *v.* Cheyne	13 App. Cas. 385	567
Edwards *v.* Carter	[1893] A. C. 360	569
Edwards' Estate, In re	11 Ir. Ch. Rep. 367	478
Egerton *v.* Brownlow (Earl)	4 H. L. C. 1	534
Egg *v.* Blayney	21 Q. B. D. 107	500
Eley *v.* Positive Government Security Life Assurance Company	1 Ex. D. 88	84
Elias *v.* Snowdon Slate Quarries Company	4 App. Cas. 454	349
Elliot *v.* North Eastern Railway Company	10 H. L. C. 333	225
Ellis *v.* Barker	L. R. 7 Ch. 104	584
—— *v.* Rogers	29 Ch. D. 661	327
Elsner and McArthur's Case	[1895] 2 Ch. 759	370
Emden *v.* Carte	19 Ch. D. 311	96
Emerson *v.* Davies	3 Story, Circuit Ct. Rep. 768	758
Emma Silver Mining Company *v.* Grant	17 Ch. D. 122	11
Emsley *v.* North Eastern Railway Company	[1896] 1 Ch. 418	225
Engel *v.* Fitch	L. R. 3 Q. B. 314; 4 Q. B. 659	324
English and Scottish Mercantile Investment Trust *v.* Brunton	[1892] 2 Q. B. 1, 700	272
Erlanger *v.* New Sombrero Phosphate Company	3 App. Cas. 1218; 5 Ch. D. 73	393, 422
Espin *v.* Pemberton	3 De G. & J. 547	267
European Bank, In re	L. R. 8 Ch. 41	559
Evans *v.* Bicknell	6 Ves. 174	266
Everitt *v.* Automatic Weighing Machine Company	[1892] 3 Ch. 506	663
Ewart *v.* Belfast Poor Law Guardians	9 L. R. Ir. 172	364
Exchange Telegraph Company *v.* Gregory & Co.	[1896] 1 Q. B. 147	751

F.

Farquhar *v.* Morris	7 T. R. 124	562
Farrand *v.* Yorkshire Banking Company	40 Ch. D. 182	272

		PAGE
Farrer *v.* Lacy, Hartland & Co.	25 Ch. D. 636; 31 Ch. D. 42	75
Faure Electric Accumulator Company, In re	40 Ch. D. 141	408
Ferrar *v.* London Commissioners of Sewers	L. R. 4 Ex. 227	225
Flamank, In re	40 Ch. D. 461	564
Fletcher, In re	9 Morrell, 8	725
Flitcroft's Case	21 Ch. D. 519	646
Flureau *v.* Thornhill	2 W. Bl. 1078	324
Forest of Dean Coal Mining Company, In re	10 Ch. D. 450	647
Fowler, In re	16 Ch. D. 723	57
Fox *v.* Fox	L. R. 19 Eq. 286	739
France *v.* Clark	26 Ch. D. 257	164
Fraser *v.* Murdoch	6 App. Cas. 855	733
Frost (S.) & Co., In re	[1898] 2 Ch. 556; [1899] 2 Ch. 207	485, 509, 512
Furtado and Jeffries, In re	27 Sol. J. 466	500

G.

Gard *v.* London Commissioners of Sewers	28 Ch. D. 486	170
Garland, Ex parte	10 Ves. 110	733
Garnham *v.* Skipper	55 L. J. (Ch.) 263; 34 W. R. 135	266
Gas Light and Coke Company *v.* Towse	35 Ch. D. 519	326
Gascoigne *v.* Barker	3 Atk. 8	310
Gateward's Case	6 Rep. 59 b	383
Gaulard and Gibb's Patent, In re	7 Rep. Pat. Cas. 367	296
Geddis *v.* Ban Reservoir Proprietors	3 App. Cas. 430	228
General Exchange Bank, In re	L. R. 6 Ch. 818	675
Gibbs, In re	[1898] 1 Ch. 625	493
Giblin *v.* McMullen	L. R. 2 P. C. 317	408, 672
Gibson *v.* Jeyes	6 Ves. 266	443
Gilchrist, Ex parte	17 Q. B. D. 521	718
Giles, In re	43 Ch. D. 391	774
Glasgow (Lord Provost and Magistrates of) *v.* Farie	13 App. Cas. 657	190
Gloag and Miller's Contract, In re	23 Ch. D. 320	518
Glossop *v.* Heston and Isleworth Local Board	12 Ch. D. 102	382
Goddard *v.* Carlisle	9 Price, 169	583
Godwin *v.* Francis	L. R. 5 C. P. 295	324
Gordon *v.* St. Mary Abbotts, Kensington (Vestry)	[1894] 2 Q. B. 742	170
Gosling *v.* Gaskell	[1897] A. C. 575	111
Goutard *v.* Carr	13 Q. B. D. 598, n.	103
Government Stock and other Securities Investment Company *v.* Manila Railway Company	[1897] A. C. 81	133
Gower *v.* Couldridge	[1898] 1 Q. B. 348	699
Grand Junction Canal Company *v.* Shugar	L. R. 6 Ch. 483; 24 L. T. 402	231, 251, 612
Gray *v.* Russell	1 Story, Circuit Ct. Rep. 11	752
Great Kruger Gold Mining Company, In re	[1892] 3 Ch. 307	775
Gregory *v.* Brunswick (Duke of)	6 Man. & G. 953	700
——— *v.* Patchett	33 Beav. 595.	670

		PAGE
Grey's Settlement, In re	34 Ch. D. 712	721
Griffith *v.* Paget	5 Ch. D. 894	623
Grigby *v.* Cox	1 Ves. Sen. 517	584
Grimshaw's Trusts, In re	11 Ch. D. 406	744
Grimstead *v.* Marlowe	4 T. R. 717	383

H.

Haigh *v.* West	[1893] 2 Q. B. 19	383
Hallett's Estate, In re	13 Ch. D. 696	556
Hallows *v.* Fernie	L. R. 3 Ch. 467	407
Hamlyn & Co. *v.* Talisker Distillery	[1894] A. C. 202	173
Hammersley, In re	[1899] 2 Ch. 339, n.	339
Hammersmith and City Road Company *v.* Brand	L. R. 4 H. L. 171	224
Hampden *v.* Buckinghamshire (Earl)	[1893] 2 Ch. 531	734
Hancock, In re	57 L. J. (Ch.) 793	163
——— *v.* Smith	41 Ch. D. 456	559
Handford & Co., In re	[1899] 1 Q. B. 566	719
Hardy, Ex parte	2 D. & Ch. 393	272
Harlock *v.* Ashberry	19 Ch. D. 539	111, 164
Harman and Uxbridge and Rickmansworth Railway Company, In re	24 Ch. D. 720	340
Harms *v.* Parsons	32 Beav. 328	16
Harpham *v.* Shacklock	19 Ch. D. 207	266
Harris *v.* Poyner	1 Drew. 174	337
Hart *v.* Swaine	7 Ch. D. 42	408
Harvey, In re	[1896] 1 Ch. 137	34
——— *v.* Farnie	8 App. Cas. 43	572
Hawes, In re	41 W. R. 173	562
Hawkins *v.* Hawkins	13 Ch. D. 470	57
Heath *v.* Crealock	L. R. 10 Ch. 22	267
—— *v.* Pugh	6 Q. B. D. 345; 7 App. Cas. 235	163
Heatley *v.* Thomas	15 Ves. 596	722
Hennell *v.* Davies	[1893] 1 Q. B. 367	96
Henry *v.* Great Northern Railway Company	1 De G. & J. 606	659
Hewitt *v.* Loosemore	9 Hare, 449	266
Hext *v.* Gill	L. R. 7 Ch. 699	190
Hiern *v.* Mill	13 Ves. 114	272
Higginson & Dean, In re	[1899] 1 Q. B. 325	187
Hill *v.* Metropolitan Asylum District	4 Q. B. D. 433; 6 App. Cas. 193	229
Hinton *v.* Donaldson	5 Pat. 509, n.	767
Hinves *v.* Hinves	3 Hare, 609	337
Hirsche *v.* Sims	[1894] A. C. 654	418
Hitchcock *v.* Coker	6 Ad. & E. 438	17
Hobbs (J. W.) & Co., In re	Unreported	650
Hodges & Smith *v.* Welsh	2 Ir. Eq. Rep. 266	751
Hodson, In re	[1894] 2 Ch. 421	573
Holland *v.* King	6 C. B. 727	262
Hollis *v.* Palmer	2 Bing. N. C. 713	111
Holtby *v.* Hodgson	24 Q. B. D. 103	719
Hood Barrs *v.* Heriot	[1896] A. C. 174	719
Hope's Settlement, In re	[1899] 2 Ch. 691, n.	691
Hopkins *v.* Grazebrook	6 B. & C. 31	324

		PAGE
Hopkins *v.* Smethwick Local Board of Health	24 Q. B. D. 712	604
Horner *v.* Graves	7 Bing. 735	30
Hornsey Local Board *v.* Monarch Investment Building society	24 Q. B. D. 1	500
Horsey Estate *v.* Steiger	W. N. (1899) 82	262
Hovenden *v.* Annesley (Lord)	2 Sch. & Lef. 607	162
——— *v.* Wallace	*The Times*, April 27, 1899	304
Howe *v.* Dartmouth (Earl)	1 W. & T. 7th ed. p. 68; 7 Ves. 137	336, 337
—— *v.* Smith	27 Ch. D. 89	713
Hubbuck *v.* Helms	56 L. J. (Ch.) 536	133
Hudson *v.* Carmichael	Kay, 613	585
Huguenin *v.* Baseley	14 Ves. 273; 1 W. & T. 7th ed. 247	578, 583
Humphries *v.* Brogden	11 Q. B. 739	230
Hunt *v.* Elmes	2 D. F. & J. 578	274
Hurdman *v.* North Eastern Railway Company	3 C. P. D. 168	231
Hutton *v.* Scarborough Cliff Hotel Company B	2 Dr. & Sm. 521	43, 64

I.

Imperial Gas Light and Coke Company *v.* Broadbent	7 H. L. C. 600	225
Imperial Mercantile Credit Association *v.* Coleman	L. R. 6 H. L. 189	407
Isaac's Case	[1892] 2 Ch. 158	85

J.

Jackson, In re	25 Ch. D. 162	316
Jackson & Co., In re	[1899] 1 Ch. 348	210, 370
Jackson *v.* Calvert	1 J. & H. 235	743
——— *v.* Rowe	2 S. & S. 472	267
Jacobs *v.* Crédit Lyonnais	12 Q. B. D. 589	173
James *v.* Buena Ventura Nitrate Grounds Syndicate	[1896] 1 Ch. 456	40
—— *v.* Kerr	40 Ch. D. 449	478
Jebb *v.* Tugwell	20 Beav. 84	337
Jefferys *v.* Dickson	L. R. 1 Ch. 183	111
——— *v.* Boosey	4 H. L. C. 815	753
Jennings *v.* Ward	2 Vern. 520	478
Jersey (Earl) *v.* Neath Union	22 Q. B. D. 555	190
John Young & Co. *v.* Bankier Distillery Company	[1893] A. C. 691	612
Johnson, In re	29 Ch. D. 964	156
———, In re	15 Ch. D. 548	733
———, In re	42 Ch. D. 505	775
Jones *v.* Badley	L. R. 3 Ch. 362	359
—— *v.* Festiniog Railway Company	L. R. 3 Q. B. 733	224
—— *v.* Smith	1 Hare, 43	269
—— *v.* Williams	2 M. & W. 326	123
—— *v.* ———	24 Beav. 47	268
Julius *v.* Oxford (Bishop)	5 App. Cas. 214	604

K.

		PAGE
Kelly *v.* Morris	L. R. 1 Eq. 697	751
Kemp *v.* Wright	[1895] 1 Ch. 121	64
Kempson *v.* Ashbee	L. R. 10 Ch. 15	584
Kendall *v.* Hamilton	4 App. Cas. 504	733
Kennedy *v.* Panama, New Zealand and Australian Royal Mail Company	L. R. 2 Q. B. 580	407
Kensit *v.* Great Eastern Railway Company	23 Ch. D. 566; 27 Ch. D. 122	363
Kharaskhoma Exploring and Prospecting Syndicate, In re	[1897] 2 Ch. 451	210, 373, 484, 512
Kingham *v.* Kingham	[1897] 1 I. R. 170	57
——— *v.* Robins	5 M. & W. 94	96
Kingston Cotton Mill Company, In re	[1896] 1 Ch. 6, 331; 2 Ch. 279	67, 407, 653
Kirby *v.* Harrogate School Board	[1896] 1 Ch. 437	224
Kirk *v.* Todd	21 Ch. D. 484	407
Kirkwood *v.* Webster	9 Ch. D. 239	591
Knapping *v.* Tomlinson	34 L. J. (Ch.) 3	316

L.

Lacey, Ex parte	6 Ves. 625	442
Lagunas Nitrate Company *v.* Lagunas Syndicate	[1899] 2 Ch. 392	671
Laing *v.* Reed	L. R. 5 Ch. 4	67
Lake's Trusts, In re	63 L. T. 416	163
Lamb *v.* Evans	[1893] 1 Ch. 218; [1892] 3 Ch. 462	767, 769
Lands Allotment Company, In re	[1894] 1 Ch. 616	644
Law *v.* Glenn	L. R. 2 Ch. 634	110
Lawrance *v.* Norreys (Lord)	15 App. Cas. 210	154
Leather Cloth Company *v.* Lorsont	L. R. 9 Eq. 345	16
Lee *v.* Neuchatel Asphalte Company	41 Ch. D. 1	640
Leeds Estate, Building and Investment Company *v.* Shepherd	36 Ch. D. 787	408, 642
Legge *v.* Legge	32 Beav. 509	349
Lehmann *v.* McArthur	L. R. 3 Ch. 496	324
Lemaitre *v.* Davis	19 Ch. D. 281	232
Lemmon *v.* Webb	[1894] 3 Ch. 1; [1895] A. C. 1	384
Leslie *v.* Young & Sons	[1894] A. C. 335	752
Levy *v.* Stogdon	[1898] 1 Ch. 478; [1899] 1 Ch. 5	714
Lewis, Ex parte	21 Q. B. D. 191	707
Liles *v.* Terry	[1895] 2 Q. B. 679	583
Lindsay Petroleum Company *v.* Hurd	L. R. 5 P. C. 239	456
Lion Mutual Marine Insurance Association *v.* Tucker	12 Q. B. D. 176	596
Lloyd's Banking Company *v.* Jones	29 Ch. D. 221	266
London and General Bank (No. 2), In re	[1895] 2 Ch. 673	670
London, Brighton and South Coast Railway Company *v.* Truman	11 App. Cas. 45	217
London Chartered Bank of Australia *v.* Lemprière	L. R. 4 P. C. 572	722

		PAGE
Lonsdale (Earl) *v.* Littledale	2 H. Bl. 267; 2 Anstr. 356; 5 Bro. P. C. 519	230, 233, n.
Lord Provost and Magistrates of Glasgow *v.* Farie	13 App. Cas. 657	190
Lowes' Settlement, In re	30 Beav. 95	163
Lowther *v.* Heaver	41 Ch. D. 248	262
Lubbock *v.* British Bank of South America	[1892] 2 Ch. 198	656
Luke *v.* South Kensington Hotel Company	11 Ch. D. 121	357
Lydney and Wigpool Iron Ore Company *v.* Bird	33 Ch. D. 85	495
Lyell *v.* Kennedy	14 App. Cas. 437	154
Lynes, In re	[1893] 2 Q. B. 113	719
Lyons & Sons *v.* Wilkins	[1896] 1 Ch. 811; [1899] 1 Ch. 255	37, 700
Lysaght *v.* Edwards	2 Ch. D. 499	733

M.

Maas *v.* Sheffield	1 Rob. Ecc. 364; 10 Jur. 417	3
M'Carthy *v.* Decaix	2 Russ. & My. 614	155
McCarthy *v.* Metropolitan Board of Works	L. R. 8 C. P. 191	611
Mace *v.* Philcox	15 C. B. (N.S.) 600	707
McKewan's Case	6 Ch. D. 447	593
Maclean *v.* Moody	20 D. 1154	770
Macleay, In re	L. R. 20 Eq. 186	540
M'Neillie *v.* Acton	4 D. M. & G. 744	734
Mainland *v.* Upjohn	41 Ch. D. 126	474
Malcomson *v.* O'Dea	10 H. L. C. 593	121
Mallan *v.* May	11 M. & W. 653	16
Manchester, Sheffield and Lincolnshire Railway Company *v.* Anderson	[1898] 2 Ch. 394	226
Manners *v.* Mew	29 Ch. D. 725	267
Manning *v.* Wasdale	5 Ad. & E. 758	278
Maple & Co. *v.* Junior Army and Navy Stores	21 Ch. D. 369	764
Markham and Darter's Case	[1899] 1 Ch. 414	210, 512
Marlborough Club Company, In re	L. R. 5 Eq. 365	597
Martin *v.* Price	[1894] 1 Ch. 276	218
Marzetti's Case	28 W. R. 541	406, 662
Mathers *v.* Green	L. R. 1 Ch. 29	294
Maxfield *v.* Burton	L. R. 17 Eq. 15	266
Maxwell's Case	L. R. 20 Eq. 585	593
May *v.* O'Neill	44 L. J. (Ch.) 660	16
Maynards, In re	[1898] 1 Ch. 515	207, 512
Mellersh *v.* Brown	45 Ch. D. 225	164
Metropolitan Asylum District *v.* Hill	6 App. Cas. 193	223
Metropolitan Board of Works *v.* London and North Western Railway Company	17 Ch. D. 246	384
Midgley *v.* Coppock	4 Ex. D. 309	500
Midland Railway Company *v.* Robinson	15 App. Cas. 19	193
Miller *v.* Dell	[1891] 1 Q. B. 468	166
—— *v.* Travers	8 Bing. 244	4
Mills *v.* Borthwick	13 W. R. 707	565
—— *v.* Dunham	[1891] 1 Ch. 576	15
Milner, In re	[1899] 1 Ch. 563	538

		PAGE
Milnes *v.* Busk	2 Ves. 488	584
Miner *v.* Gilmour	12 Moo. P. C. 131	612
Missouri Steamship Company, In re	42 Ch. D. 321	173, 753
Mitchel *v.* Reynolds	1 P. Wms. 181	25
Mogul Steamship Company *v.* McGregor, Gow & Co.	23 Q. B. D. 598; [1892] A. C. 25	699
Moon *v.* Dickinson	63 L. T. 371	99
Morgan *v.* Milman	10 Hare, 279	733
——— *v.* Minett	6 Ch. D. 638	583
——— *v.* Rhodes	1 My. & K. 435	262
——— *v.* Rowlands	L. R. 7 Q. B. 493	111
Morley *v.* Loughnan	[1893] 1 Ch. 736	584
——— *v.* Morley	5 D. M. & G. 610	34
Mortlock *v.* Buller	10 Ves. 292	733
Moxham *v.* Grant	[1899] 1 Q. B. 480	652
Moxon *v.* Payne	L. R. 8 Ch. 881	584
Mulkern *v.* Lord	4 App. Cas. 182	84
Mumford *v.* Gething	7 C. B. (N.S.) 305	16
——— *v.* Stohwasser	L. R. 18 Eq. 556	266
Mundy and Roper's Contract, In re	[1899] 1 Ch. 275	145
Muriel *v.* Tracy	6 Mod. 169	701

N.

National Funds Assurance Company, In re	10 Ch. D. 118	652
Nedby *v.* Nedby	5 De G. & Sm. 377	578
New Eberhardt Company, In re	43 Ch. D. 118	210, 373, 485
New, Prance & Garrard's Trustee *v.* Hunting	[1897] 2 Q. B. 19; [1899] A. C. 419	726, 728
New River Company *v.* Johnson	2 E. & E. 435	250
New Sombrero Phosphate Company *v.* Erlanger	5 Ch. D. 73	659
New Travellers' Chambers, In re	[1895] 1 Ch. 395	775
New Zealand Gold Extraction Company *v.* Peacock	[1894] 1 Q. B. 622	40, 133
Newbigging *v.* Adam	34 Ch. D. 582	408
Newbould *v.* Smith	33 Ch. D. 127	111
Newman, In re	3 Ch. D. 494	11
Nicholl *v.* New Eberhardt Company	61 L. T. 489; 1 Megone 402	616
Nicholls *v.* Stretton	7 Beav. 42; 10 Q. B. 346	16
Nicols *v.* Pitman	26 Ch. D. 374	752
Nisbet Hamilton *v.* North British Railway Company	13 R. 454	193
Noble *v.* Willock	L. R. 8 Ch. 778	4
Nordenfelt *v.* Maxim Nordenfelt Guns and Ammunition Company	[1894] A. C. 535	17, 553
Northern Counties of England Fire Insurance Company *v.* Whipp	26 Ch. D. 482	266
Nuneaton Local Board *v.* General Sewage Company	L. R. 20 Eq. 127	279

O.

Ooregum Gold Mining Company of India *v.* Roper	[1892] A. C. 125	210, 374

		PAGE
Ormerod *v.* Todmorden Joint Stock Mill Company	11 Q. B. D. 155	362
Other *v.* Iveson	3 Drew. 177	295
Overend, Gurney & Co. *v.* Gibb	L. R. 5 H. L. 480	406, 672
——— *v.* Gurney	L. R. 4 Ch. 701	407
Owen *v.* Davies	W. N. (1874) 175	611
——— *v.* Delamere	L. R. 15 Eq. 134	734
Owen & Co. *v.* Cronk	[1895] 1 Q. B. 265	110
Oxford and Cambridge Universities *v.* Gill & Sons	[1899] 1 Ch. 55	700
Oxford Benefit Building and Investment Society, In re	35 Ch. D. 502	661

P.

Paget *v.* Marshall	28 Ch. D. 255	519
——— *v.* Paget	[1898] 1 Ch. 470	586
Palmer *v.* Temple	9 Ad. & E. 508	710
Panama and South Pacific Telegraph Company *v.* India Rubber, Gutta Percha and Telegraph Works Company	L. R. 10 Ch. 515	427
Panama, New Zealand and Australian Royal Mail Company, In re	L. R. 5 Ch. 318	133
Papè *v.* Westacott	[1894] 1 Q. B. 272	76
Papendick *v.* Bridgwater	5 E. & B. 166	121
Parker, In re	19 Ch. D. 44	743
Parker-Jervis, In re	[1898] 2 Ch. 643	493
Parsons *v.* Cotterill	56 L. T. 839	22
Pasmore *v.* Oswaldtwistle Urban Council	[1898] A. C. 387	384
Patent Cocoa Fibre Company, In re	Unreported	650
Patrick *v.* Simpson	24 Q. B. D. 128	154
Peacock, Ex parte	L. R. 8 Ch. 682	10
Pearks *v.* Moseley	5 App. Cas. 714	22, 316
Pease *v.* Pattinson	32 Ch. D. 154	154
Pedder *v.* Preston Corporation	12 C. B. (N.S.) 535	559
Peek *v.* Derry	37 Ch. D. 541	437
Pegler *v.* White	33 Beav. 403	555
Pelton Brothers *v.* Harrison	[1891] 2 Q. B. 422	717
Pepe *v.* City and Suburban Permanent Building Society	[1893] 2 Ch. 311	43, 64
Perls *v.* Saalfeld	[1892] 2 Ch. 149	25
Perren *v.* Monmouthshire Railway and Canal Company	11 C. B. 855	103
Peto *v.* Hammond	30 Beav. 495	269
Phillips *v.* Caldcleugh	L. R. 4 Q. B. 159	518
——— *v.* Homfray	24 Ch. D. 439	407
——— *v.* Low	[1892] 1 Ch. 47	230
Phosphate Sewage Company *v.* Hartmont	5 Ch. D. 394	659
Pickard *v.* Sears	6 Ad. & E. 469	262, 654
Pickering *v.* Pickering	4 My. & Cr. 289	337
Pike *v.* Fitzgibbon	14 Ch. D. 837; 17 Ch. D. 454	721
Plumb *v.* Fluitt	2 Anstr. 432	266
Popplewell *v.* Hodkinson	L. R. 4 Ex. 248	217
Postlethwaite *v.* Port Phillip and Colonial Gold Mining Company	43 Ch. D. 452	622
Potter *v.* Edwards	26 L. J. (Ch.) 468	478
Preston *v.* Dania	L. R. 8 Ex. 19	566

		PAGE
Purves *v.* Landell	12 Cl. & F. 91	407
Pybus *v.* Smith	1 Ves. 189	584

R.

Race *v.* Ward	4 E. & B. 702	278
Radnor's (Earl) Will Trusts, In re	45 Ch. D. 402	684
Ramsden *v.* Dyson	L. R. 1 H. L. 129	262
Ramskill *v.* Edwards	31 Ch. D. 100	408
Rance's Case	L. R. 6 Ch. 104	406, 655
Randell, In re	38 Ch. D. 213	547
Rannie *v.* Irvine	7 Man. & G. 969	26
Ratcliffe *v.* Barnard	L. R. 6 Ch. 652	264
Rawlins *v.* Wickham	1 Giff. 355; 3 De G. & J. 304	408
Read *v.* Fenn	35 L. J. (Ch.) 464	154
Redding, In re	[1897] 1 Ch. 876	57
Redgrave *v.* Hurd	20 Ch. D. 1	408
Reeves *v.* Butcher	[1891] 2 Q. B. 509	110
Reg. *v.* Brabrook	69 L. T. 718	67
Reliance Permanent Benefit Building Society, In re	61 L. J. (Ch.) 453	64
Rex *v.* Pease	4 B. & Ad. 30	224
Rhodes *v.* Bate	L. R. 1 Ch. 252	583
Richardson *v.* Horton	6 Beav. 185	296
——— *v.* Mellish	2 Bing. 229	534
Richardson's Trusts, In re	17 L. R. Ir. 436	538
Ridgway *v.* Wharton	6 H. L. C. 238	734
Ridley, In re	11 Ch. D. 645	547
Rigby *v.* Bennett	21 Ch. D. 559	230
Roberts, In re	14 Ch. D. 49	565
Robinson *v.* Currey	7 Q. B. D. 465	525
——— *v.* Harman	1 Ex. 850	324
Robinson & Co. *v.* Heuer	[1898] 2 Ch. 451	16
Robson *v.* Smith	[1895] 2 Ch. 118	133
Roe *v.* Rawlings	7 East, 279	124
Rolland *v.* Hart	L. R. 6 Ch. 678	357
Rooper *v.* Harrison	2 K. & J. 86	267
Rose *v.* Watson	10 H. L. C. 672	714
Rousillon *v.* Rousillon	14 Ch. D. 351	30
Rowbotham *v.* Dunnett	8 Ch. D. 430	359
——— *v.* Wilson	8 H. L. C. 348	230
Rowe, In re	W. N. (1889) 161; 58 L. J. (Ch.) 703	158
Rudhall's (Serjeant) Case	Savile, Case clv. p. 76; Moore, 212; 1 Leon. 298	549, 551
Russian Spratts Patent, In re	[1898] 2 Ch. 149	306
Rylands *v.* Fletcher	L. R. 3 H. L. 330	224

S.

Sadler *v.* Great Western Railway Company	[1896] A. C. 450	699
St. Leonard's, Shoreditch (Guardians of) *v.* Franklin	3 C. P. D. 377	527
Salomon *v.* Salomon & Co.	[1897] A. C. 22	393, 657
Salter *v.* Cavanagh	1 D. & Wal. 668	154

		PAGE
Sandwich (Earl) *v.* Great Northern Railway Company	10 Ch. D. 707	611
Savile *v.* Roberts	1 Ld. Raym. 374	701
Scott and Alvarez's Contract, In re	[1895] 1 Ch. 596; 2 Ch. 603	520
——— *v.* Morley	20 Q. B. D. 120	718
Seaton *v.* Seaton	13 App. Cas. 61	572
Selwood *v.* Mildmay	3 Ves. 306	4
Shannon *v.* Bradstreet	1 Sch. & Lef. 52	733
Sharp *v.* Jackson	[1899] A. C. 419	728
Sharpe, In re	[1892] 1 Ch. 154	408, 661
Sheffield and South Yorkshire Permanent Building Society *v.* Aizlewood	44 Ch. D. 412	408
Shelfer *v.* City of London Electric Lighting Company	[1895] 1 Ch. 287	218
Sherry, In re	25 Ch. D. 692	559
Sixth West Kent Mutual Building Society *v.* Shove	[1899] 2 Ch. 64, n.	64
Skinner *v.* Gunton	1 Saund. 228d	700
Smith, In re	3 Morrell, 179	10
——— *v.* Archibald	5 App. Cas. 489	279, 364
——— *v.* Chadwick	9 App. Cas. 187	662
——— *v.* Hughes	L. R. 6 Q. B. 597	262
——— *v.* Kenrick	7 C. B. 515	254
——— *v.* London and North Western Railway Company	2 E. & B. 69	294
——— *v.* Lucas	18 Ch. D. 531	569
Smith's Case	11 Ch. D. 579	357
Smurthwaite *v.* Hannay	[1894] A. C. 494	699
Softlaw *v.* Welch	[1899] 2 Q. B. 419	718
Soper *v.* Arnold	37 Ch. D. 96	408
Sottomayer *v.* De Barros	5 P. D. 94	572
South Durham Iron Company, In re	11 Ch. D. 579	359
Southwark and Vauxhall Water Company *v.* Wandsworth District Board of Works	[1898] 2 Ch. 603	224
Spencer *v.* Harding	L. R. 5 C. P. 561	76
——— *v.* Scurr	31 Beav. 334	349
Spickernell *v.* Hotham	Kay, 669	562
Spiller, In re	18 Ch. D. 614	316
——— *v.* Maude	32 Ch. D. 158, n.	149
Stamford, Spalding and Boston Banking Company *v.* Smith	[1892] 1 Q. B. 765	111
Stanhope's Trusts, Re	27 Beav. 201	316
Steavenson *v.* Berwick Corporation	1 Q. B. 154	96
Steers *v.* Rogers	[1893] A. C. 232	294
Stenning, In re	[1895] 2 Ch. 433	556
Stewart *v.* Stewart	15 Ch. D. 539	158
Stogdon *v.* Lee	[1891] 1 Q. B. 661	721
Stone *v.* Stone	L. R. 5 Ch. 74	562
Strickland *v.* Symons	26 Ch. D. 245	733
Stringer's Case	L. R. 4 Ch. 475	655
Strohmenger *v.* Borough of Finsbury Permanent Investment Building Society	[1897] 2 Ch. 469	67
Stroud *v.* Lawson	[1898] 2 Q. B. 44	702
Sumner *v.* Powell	2 Mer. 30	295
Sunderland 36th Universal Building Society, In re	24 Q. B. D. 394	64
Surman *v.* Wharton	[1891] 1 Q. B. 491	722

		PAGE
Sutherland (Dowager Duchess) *v.* Sutherland (Duke)	[1893] 3 Ch. 169	684
Sutton *v.* Sutton	22 Ch. D. 511	163
Swabey *v.* Port Darwin Gold Mining Company	1 Megone, 385	85
Sweet *v.* Benning	16 C. B. 459	751
——— *v.* Maugham	11 Sim. 51	751
Swindon Waterworks Company *v.* Wilts and Berks Canal Navigation Company	L. R. 7 H. L. 697	611

T.

Tailby *v.* Official Receiver	13 App. Cas. 523	531
Tallis *v.* Tallis	1 E. & B. 391	16
Tate *v.* Williamson	L. R. 1 Eq. 528	405
Taylor, Ex parte	18 Q. B. D. 295	726
——— *v.* Russell	[1892] A. C. 244	266
Teape's Trusts, In re	L. R. 16 Eq. 442	538
Teulière *v.* St. Mary Abbotts, Kensington (Vestry)	30 Ch. D. 642	170
Thackwray and Young's Contract, In re	40 Ch. D. 34	540
Thompson *v.* London County Council	[1899] 1 Q. B. 840	699
Thomson *v.* Clydesdale Bank	[1893] A. C. 282	559
Thornton *v.* Thornton	L. R. 20 Eq. 599	538
Tickle *v.* Brown	4 Ad. & E. 369	123
Tomlinson, In re	[1898] 1 Ch. 232	54
Toplis *v.* Baker	2 Cox, 118	165
Tottenham Local Board of Health *v.* Rowell	15 Ch. D. 378	500
Tottenham Urban Council *v.* Williamson & Sons	[1896] 2 Q. B. 353	279
Tourle *v.* Rand	2 Bro. C. C. 650	272
Trade Auxiliary Company *v.* Middlesborough and District Tradesmen's Protection Association	40 Ch. D. 425	751
Trevor *v.* Whitworth	12 App. Cas. 409	655
Trinidad Asphalt Company *v.* Ambard	[1899] 2 Ch. 260, n.	260
Tubbs *v.* Wynne	[1897] 1 Q. B. 74	500
Tufnell and Ponsonby's Case	29 Ch. D. 421	305
Tullett *v.* Armstrong	1 Beav. 1; 4 My. & Cr. 377	718
Tunbridge Wells Corporation *v.* Baird	[1896] A. C. 434	364
Turcan, In re	40 Ch. D. 5	532
Turquand *v.* Marshall	L. R. 4 Ch. 376	630

U.

Udney *v.* Udney	L. R. 1 H. L., Sc. 441	572
Underwood & Son *v.* Barker	[1899] 1 Ch. 300	15

V.

Van Grutten *v.* Digby	31 Beav. 561	569
Vaughan *v.* Taff Vale Railway Company	5 H. & N. 679	224

		PAGE
Verner *v.* General and Commercial Investment Trust	[1894] 2 Ch. 239	640
Vingoe and Davies, In re	1 Manson, 416	725
Vint *v.* Hudspith	30 Ch. D. 24	9

W.

Wainman *v.* Kynman	1 Ex. 118	111
Waitekauri Gold Mining Company, In re	*The Times*, Aug. 11, 1897	374
Walker *v.* Goe	4 H. & N. 350	437
Wall *v.* London and Northern Assets Corporation	[1898] 2 Ch. 469	134
Wallace *v.* Universal Automatic Machines Company	[1894] 2 Ch. 547	133
Wallasey Local Board *v.* Gracey	36 Ch. D. 593	279
Walter *v.* Steinkopff	[1892] 3 Ch. 489	753
Walton *v.* Edge	10 App. Cas. 33	65
——— *v.* Lavater	8 C. B. (N.S.) 162	294
Ward *v.* Byrne	5 M. & W. 548	16
——— *v.* Duncombe	[1893] A. C. 369	356
Warlow *v.* Harrison	1 E. & E. 295	73
Wasdale, In re	[1899] 1 Ch. 163	358
Webb *v.* Earle	L. R. 20 Eq. 556	659
Webber, In re	[1896] 1 Ch. 914	491
Webster *v.* British Empire Mutual Life Assurance Company	15 Ch. D. 169	565
Welton *v.* Saffery	[1897] A. C. 299	657
Weston *v.* New Guston Company	62 L. T. 275; 1 Megone, 352; 64 L. T. 815	622
Wheal Buller Consols, In re	38 Ch. D. 42	85
Wheaton *v.* Peters	33 U. S. 591	752
Wheeler *v.* United Telephone Company	13 Q. B. D. 597	96
Whincup *v.* Hughes	L. R. 6 C. P. 78	715
Whitbread *v.* Jordan	1 Y. & C. Ex. 303	272
Whitchurch *v.* Fulham Board of Works	L. R. 1 Q. B. 233	603
White *v.* Evans	4 Ves. 21	160
——— *v.* Tyndall	13 App. Cas. 263	295
Whitehead, In re	[1894] 1 Ch. 678	338
Wilde *v.* Gibson	1 H. L. C. 605	416
Wilder *v.* Pigott	22 Ch. D. 263	573
Wilkins *v.* Aikin	17 Ves. 422	765
William Robinson & Co. *v.* Heuer	[1898] 2 Ch. 451	16
Williams *v.* Glenton	L. R. 1 Ch. 200	324
Willis *v.* Howe (Earl)	43 L. T. 375	156
——— *v.* ———	29 W. R. 70	160
Willmott *v.* Barber	15 Ch. D. 96	262, 519
——— *v.* London Celluloid Company	34 Ch. D. 147	133
Wilmer *v.* Currey	2 De G. & Sm. 347	295
——— *v.* McNamara & Co.	[1895] 2 Ch. 245	653
Wilson *v.* Hart	L. R. 1 Ch. 463	268
Wilts, Somerset and Weymouth Railway Company, In re	Unreported. Before Hall V.-C. Feb. 11, 1881	143
Winchester (Bishop) *v.* Mid-Hants Railway Company	L. R. 5 Eq. 17	734
Wintle, In re	[1896] 2 Ch. 711	743
Wood *v.* Boosey	L. R. 3 Q. B. 223	768
——— *v.* Leetham	61 L. J. (Q.B.) 215	103
Woolway *v.* Rowe	1 Ad. & E. 114	123

		PAGE
Worthington *v.* Morgan	16 Sim. 547	269
Wrotesley *v.* Adams	Plowd. 187	310
Wyatt *v.* Barnard	3 V. & B. 77	751

Y.

Young and Harston's Contract, In re	31 Ch. D. 168	654
Young *v.* Grove	4 C. B. 668	156

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re ATKINSON.
WALLER *v.* ATKINSON.

[1897 A. 583.]

C. A.
1899
April 24, 25.

Married Woman—Will—Probate—Invalid Bequest—Grant of General Probate to Husband—Implied Assent to Will.

Since the coming into operation of the amended rules 15 and 18 of the Probate Rules (Non-Contentious Business), which provide that probate of the will of a married woman shall take the form of ordinary grants of probate without any exception or limitation, a husband who obtains probate of his wife's will in general form is not deemed to have assented to the will as a disposition of property which she had no right to dispose of by will without his assent.

Decision of Stirling J., [1898] 1 Ch. 637, affirmed.

Held, further, that upon the true construction of the will the property in dispute was not included in the bequest, and, therefore, that the question of assent did not arise.

THIS was an appeal by the plaintiffs from a decision of Stirling J. (1)

By her will, dated May 6, 1880, the testatrix bequeathed "all the personal estate of which by virtue of any power or authority, or of any separate right of property or otherwise

(1) [1898] 1 Ch. 637.

C. A. 1899

ATKINSON, *In re.* WALLER *v.* ATKINSON.

howsoever, I am competent to dispose (including my portion or fortune and other interest, if any, under the will of my late father James Shaw Taylor) " to her husband absolutely, subject nevertheless to the payment thereout of the pecuniary legacy thereinafter bequeathed. The testatrix then bequeathed to Levina Waller, a sister of her late father, a sum of 10,000*l.*, which was to go over, in the event of the said Levina Waller dying in the lifetime of the testatrix, to the persons who would be entitled as her (Levina Waller's) next of kin if she had died immediately after the decease of the testatrix; and the testatrix appointed her husband sole executor of her will. The testatrix died in February, 1892, and in the following May her husband obtained probate of her will in general form, the net value of the estate being sworn at 41,696*l.* At the time of her death there was pending a litigation in the State of New York with reference to the estate of J. S. Taylor mentioned in the will. J. S. Taylor was an Englishman, but he had considerable property in the United States, and one of the trustees of his will, who was resident in New York, had instituted a suit against the persons interested under that will or otherwise in the estate of J. S. Taylor for the purpose of having the estate, so far as it was under the control of the United States or the State of New York, administered by the Court. To that litigation the next of kin of Levina Waller, who had died in the lifetime of the testatrix, were parties, and after the death of the testatrix her husband, as her legal representative, also became a party, and put in an answer which was relied on by the appellants as shewing his assent to the legacy of 10,000*l.* bequeathed by her will. It was ultimately held, as the result of the litigation in America, that the testatrix had no power of disposition over the property which came to her under the will of J. S. Taylor, but that she had an interest which did not form part of her separate estate, and could not be disposed of by her will without the assent of her husband, and that this interest would, if she had not so disposed of it, pass to her husband at her death. J. S. Taylor also left property undisposed of which Mrs. Atkinson took as his next of kin; but inasmuch as she was married before 1870,

this did not become her separate estate under s. 7 of the Married Women's Property Act, 1870. It was stated that she had but little other property.

The legatees of the 10,000*l.* took out a summons for payment thereof to them, and the question in dispute was whether Mr. Atkinson had, by proving his wife's will in general form, assented to it as a disposition of property which she had no power to dispose of by will without his assent.

Stirling J. held that the husband had not assented to the legacy.

The legatees appealed.

The appeal was heard on April 24, 25, 1899. At the hearing of the appeal a letter dated October 13, 1893, was read on behalf of the appellants—which was not read in the Court below—tending to shew that Mr. Atkinson did assent to his wife's disposition by will.

Butcher, *Q.C.*, and *Methold*, for the appellants, urged the same arguments as in the Court below, and in addition to the cases then cited referred, on the point that the assent by a husband to his wife's disposition when once given cannot be withdrawn, to *Brook* v. *Turner* (1); *Maas* v. *Sheffield* (2); Williams on Executors, 9th ed. vol. i. p. 48. They also argued that upon the true construction of Mrs. Atkinson's will, as well as on the ground of assent by her husband, the appellants were entitled to the 10,000*l.* legacy.

Jenkins, *Q.C.*, *Stewart-Smith*, and *R. H. Dun*, for the respondent, Atkinson, urged the same arguments as in the Court below, contending that under the new practice, as laid down by the amended rules 15 and 18 of the Probate Rules (Non-Contentious Business), 1887 (3), the Court ought not

(1) (1676) 2 Mod. 170.

(2) (1845) 1 Rob. Ecc. 364; 10 Jur. 417.

(3) The amended rules 15 and 18 of the Probate Rules (Non-Contentious Business), to take effect on April 19, 1887, provide as follows: "In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters

C. A. 1899 — ATKINSON, *In re.* WALLER *v.* ATKINSON.

to attribute to the grant of probate to the husband the effect it formerly had; and, secondly, that the testatrix had not intended to dispose by her will of the property she had inherited from her father, and had not in fact done so.

Butcher, Q.C., in reply, referred to *Selwood* v. *Mildmay* (1) and *Miller* v. *Travers*. (2)

LINDLEY M.R. I do not think when this case is threshed out that there is any real difficulty about it. The practical question which we have to decide is whether the plaintiffs are entitled to a legacy under this will in the events which have happened. They base their title upon the construction of the will of Mrs. Atkinson, and upon the assent of her husband after her death to the bequest which she has made. The testatrix was married in or before 1868, and whilst she was married she made a will in the ordinary form of a will made by a married woman. A married woman in those days could not make a valid will of personal estate unless it was settled to her separate use, or unless she had some power of disposition over it which she could exercise without the assent of her husband. With his assent she could make a will, and I do not know that the effect of the assent is better put anywhere than by Lord Selborne in the case of *Noble* v. *Willock* (3), where the Court of Appeal, and afterwards the House of Lords, had to consider the effect of the Wills Act on dispositions made by married women. Lord Selborne says this: "What is the doctrine of law as to the husband's assent? As I understand all the authorities and all the cases, it means neither more nor less than this, that, as to all the property of the wife of which the husband is purchaser, which, if reduced into possession during the marriage, becomes by law his, and which, if it remains not

---

of administration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed without any exception or limitation, and issue to an executor or other person authorized in usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin of the testatrix in case of a partial intestacy."—W. N. (1887) pt. ii. p. 172.

(1) (1797) 3 Ves. 306.

(2) (1832) 8 Bing. 244.

(3) (1873) L. R. 8 Ch. 778, 789.

reduced into possession when the marriage is dissolved by the wife's death, becomes also by law his (subject indeed to the necessity of taking out administration to the wife); as to all this property, vested in him in his marital right, he may, if he pleases, waive his right, and so waive it as to give effect to a will made by his wife during the coverture in derogation of his marital right."

There is a further passage about the revocation of an assent. I do not read that, but, as I understand the authorities, the husband is at liberty during the life of his wife to license her to make a will and to revoke that licence, but if after her death he has really assented to her will he cannot revoke it. Now, before Stirling J. the case was argued upon the question whether the husband had assented, and the plaintiffs relied mainly upon the ground that he had proved the will in general form in May, 1892, and no doubt under the old law that would have been an assent to the will. It could not of course affect the construction, but it would have been an assent. The construction of the will does not appear to have been seriously brought to the attention of the learned judge or discussed. The argument was based upon the fact of proving it, and the learned judge decided, in my opinion correctly, that, having regard to the alteration of the law in proving wills by husbands, the mere fact that a husband now proves his wife's will in general form does not amount to an assent to the disposition. Formerly it did, because there were two steps in the probate—there was a probate as to that part which she could dispose of without his assent, and then there was another probate as to the rest. Now it is all one. The inference that used to be drawn before the law was altered when probate by the husband amounted to an assent can no longer be drawn, and Stirling J.'s judgment on the facts before him appears to me to be correct in all points.

On the appeal, however, the case has been argued on further materials, and we have admitted a very important letter of October 13, 1893, which, taken in connection with the other evidence, raises a rather strong inference that the husband did assent to this will. I do not decide that he did, because we

C. A. 1899 ATKINSON, *In re.* WALLER *v.* ATKINSON. Lindley M.R.

have not given the respondent an opportunity of explaining that. In the view I take of it, it is quite unnecessary to explain it, and I merely say this—that as the matter stands without explanation I think I should come to the conclusion that there had been an assent. That letter was not before Stirling J. at all, and the evidence of assent, apart from probate, before him was quite insufficient to establish an assent.

Then we come to this. What is the assent to, supposing that he has assented to the will? The will is that of a married woman giving a property in general terms to her husband—I attach very great importance to that—subject to the payment of a legacy of 10,000*l*. Is there anything in this will which fairly construed leads to the view that she was disposing of that which her husband would take without any disposition by her at all? I cannot find anything of that kind in the will. I do not think she had any idea that she was making a will of property which would pass to her husband without her assistance. She says, "I give all the personal estate of which by virtue of any power or authority, or of any separate right of property or otherwise howsoever, I am competent to dispose (including my portion or fortune and other interest, if any, under the will of my late father) unto my husband for his own absolute use"—subject to this legacy. Looking at that language fairly—not hypercritically, because I never like that—can I fairly come to the conclusion that she was dreaming of disposing of property which would go to her husband if she did not make a will? No; she erroneously assumed that what she was disposing of would not otherwise go to her husband, but that it was property which she could somehow or other dispose of, either because it was for her separate use or in some other way. It appears to me to be forcing the language, or putting an unfair construction upon it, to construe this as amounting to a disposition by her to her husband of property which he would take if she made no disposition. His assent cannot give an effect to the bequest which it would not have upon the true construction of her will. I cannot help thinking that his assent was given upon the supposition that she had made a valid will and under an entire misapprehension of the

facts. On the true construction of the will it appears to me that the plaintiffs are not entitled to this legacy, and the appeal ought to be dismissed with costs.

C. A. 1899 ATKINSON, *In re.* WALLER *v.* ATKINSON.

RIGBY and COLLINS L.JJ. concurred.

Solicitors: *Learoyd, James & Mellor, for Learoyd & Co., Huddersfield; Busk, Mellor & Norris, for Sale, Seddon & Co., Manchester.*

W. W. K.

In re BRITISH GOLD FIELDS OF WEST AFRICA.

C. A. 1899 *May* 10, 13.

Limited Company—Shareholder—Rectification of Register—Winding-up—Debts and Liabilities incurred before—Costs incurred after—Contingent Liability—Bankruptcy, Rules in—Proof—Provable Debt—Unliquidated Damages—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 158—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37.

A shareholder in a limited company having applied, before its winding-up, for rectification of the register under s. 35 of the Companies Act, 1862, and repayment of the sum paid for his shares, obtained, after the winding-up, an order for rectification and repayment, and was admitted by the official receiver, who was also the liquidator, to prove for the sum ordered to be repaid, but not for the costs of the application:—

Held, by the Court of Appeal (affirming the decision of Wright J. on appeal from the official receiver), that the application not being a claim for unliquidated damages, and the register having been rectified, the sum sought to be repaid was clearly a provable debt, and accordingly that, under s. 37 of the Bankruptcy Act, 1883, made applicable to companies in liquidation by s. 10 of the Judicature Act, 1875, the costs should be added to the provable debt.

The rules as to proof in bankruptcy for costs of proceedings taken against the bankrupt before or after the bankruptcy, stated.

IN November, 1896, a number of shareholders in the British Gold Fields of West Africa, Limited, made applications under s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), to have their names removed from the register, and for repayment by the company of the amounts they had respectively paid for their shares, on the ground of misrepresentation in the prospectus. Of these applications two were heard and succeeded,

C. A. 1899

BRITISH GOLD FIELDS OF WEST AFRICA, *In re.*

the company being ordered to pay the costs of them. The rest simply stood over until the other two were disposed of, but there was no order that they should abide the result of the two which were decided, and there was no order as to the costs of those which stood over.

In January, 1898, after the two had succeeded and before anything more was done with the other applicants, the company was ordered to be wound up. Shortly afterwards the latter applicants took out a summons in the winding-up for leave to proceed with their applications or for liberty to prove for the amounts sought to be recovered, and for their costs. Their right to be removed from the register and to prove for the amounts paid for their shares was not contested, and an order for rectification was made accordingly; but the official receiver, who was also the liquidator, refused to allow them to prove for their costs as against the company, on the ground that the company was insolvent. The matter then came before Wright J., who held that the applicants were entitled to add their taxed costs to their respective debts and to prove for the same in the winding-up.

From that order the official receiver appealed on the ground that only such debts and liabilities as were provable in bankruptcy could be proved against an insolvent company in the course of being wound up, and that the costs in question did not come within s. 37 of the Bankruptcy Act, 1883. (1)

Gore-Browne, for the appellant, the official receiver. By s. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), the rules in bankruptcy are now to apply in the winding-up of

(1) Sect. 37 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), provides as follows:—

"(1.) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy. (2.) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice. (3.) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

companies. It is therefore necessary, for the decision of the present question, to consider whether these costs come within s. 37, sub-s. 3, of the Bankruptcy Act, 1883. To come within this sub-section, the costs must be a "debt" or "liability" to which the company was subject at the commencement of the liquidation or afterwards became subject "by reason of any obligation incurred before" the commencement of the liquidation. Now, there could be no "liability" for costs until an order for payment was made, and as these costs have been incurred by the company since the commencement of the winding-up, and there was no "obligation" on the company before, they are not provable: *Re Bluck*. (1)

Kenyon Parker, for the respondents, the shareholders. Our applications for rectification of the register of shareholders were made under s. 35 of the Companies Act, 1862, which provides that if a person has been improperly placed on the register the Court may rectify it and order the company to pay the costs. Now, a shareholder who is wrongly on the register does not get relief merely by the company removing his name: he wants also the costs of his application. Here the company was proved guilty of fraud upon the applications that were heard and disposed of before the liquidation, and our right to be removed from the register as persons also defrauded by the company has since been admitted. Consequently our applications, which were made before the liquidation, would have succeeded if they had come to a hearing, and it is clear that the company would have had to pay the costs of them under s. 35 of the Companies Act. The Bankruptcy Act has therefore in fact nothing to do with the case; but assuming it has, then I say these costs were a "contingent liability" within s. 37, sub-s. 3, of that Act, and therefore provable as such: *Vint* v. *Hudspith*. (2)

Gore-Browne, in reply. The only right a creditor has to prove against an insolvent company is for a debt existing at the date of the commencement of the winding-up, and it must be a debt in the form of a "present or future, certain or contingent," liability. These costs were not a debt in either of

(1) (1887) 57 L. T. 419. (2) (1885) 30 Ch. D. 24.

C. A. 1899

BRITISH GOLD FIELDS OF WEST AFRICA, *In re.*

those forms at that date. They were not a liability at all; all the applicants had was a mere chance or possibility. In *Vint* v. *Hudspith* (1) it was distinctly held that there was no obligation or liability to pay costs until an order was made; and the Court expressed very great doubt whether a possibility of having to pay costs was a provable debt.

[LINDLEY M.R. How do you say this question would have stood in the case of a pending application under s. 35 of the Companies Act before the Judicature Act?]

It would have stood exactly as it does now. Prior to 1875 the question would have been regulated by s. 158 of the Companies Act, which provided that in the event of a winding-up "all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company." That section was cut down by s. 10 of the Judicature Act, 1875, to insolvent companies; but it still applies to solvent companies.

[LINDLEY M.R. What do you say to *In re Smith*? (2)]

The distinction between that case and the present case is this. Here, at the time of the bankruptcy, there was no obligation on the company to pay costs; there was a possibility but not a liability; whereas in *In re Smith* (2), by virtue of the agreement for reference to arbitration, there was a contract to pay what should be awarded under the arbitration, that is to say, to pay costs if awarded: so that the obligation existed before the bankruptcy. If there had been no agreement for arbitration, there would have been no obligation to pay costs: there would have been, as here, a mere chance whether costs would become payable. In *Ex parte Peacock* (3) a verdict for costs having been obtained against a debtor before his bankruptcy though not taxed till after, it was held that the costs were provable. That case shews that if the verdict had not been obtained before the bankruptcy the costs would not have been provable. Should this appeal be successful, I do not ask for costs, as the official receiver desires to know what should be the practice in the office.

(1) 30 Ch. D. 24. (2) (1886) 3 Morrell, 179. (3) (1873) L. R. 8 Ch. 682.

LINDLEY M.R. This being a matter of importance and of some novelty, we will take time to consider it.

May 13. The judgment of the Court (Lindley M.R., Rigby and Collins L.JJ.) was delivered by

LINDLEY M.R., who, after stating the facts, continued:— Upon carefully examining s. 37 and the decisions upon it and corresponding sections in earlier Bankruptcy Acts, I am satisfied that the order appealed from is correct. The 10th section of the Judicature Act, 1875, has rendered s. 37 of the Bankruptcy Act, 1883, the enactment by which the question must be determined; s. 158 of the Companies Act, 1862, is no longer the governing section in a case like this. [His Lordship read s. 37, and continued:—] The decisions on this section have established the following rules, which are consistent and reasonable, and quite in accordance with the language of the section.

If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise.

If, therefore, what is recovered is unliquidated damages "arising otherwise than by reason of a contract, promise, or breach of trust," that sum is not recoverable unless judgment, or at least a verdict for it, has been obtained before adjudication, or now the receiving order; and if the sum recovered is not provable, neither are the costs of recovering it: *In re Newman* (1); *Re Bluck.* (2) On the other hand, if what is recovered is provable, so are the costs of recovering it: see *Emma Silver Mining Co.* v. *Grant.* (3)

If the action against a person who becomes bankrupt is unsuccessful, no costs become payable by him or out of his estate, and no question as to them can arise. But if an unsuccessful action is brought by a man who becomes bankrupt, then, if he is ordered to pay the costs, or if a verdict is given against him before he becomes bankrupt, they are

(1) (1876) 3 Ch. D. 494. (2) 57 L. T. 419.
(3) (1880) 17 Ch. D. 122.

C. A. 1899

BRITISH GOLD FIELDS OF WEST AFRICA, *In re.*

provable: *Ex parte Peacock.* (1) On the other hand, if no verdict is given against him and no order is made for payment of costs until after he becomes bankrupt, they are not provable. In such a case there is no provable debt to which the costs are incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy; nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy. This was the case of *Vint* v. *Hudspith.* (2)

An application under s. 35 of the Companies Act, 1862, to rectify the register and for a return of money paid is not a claim for unliquidated damages. It is a claim for two things, namely, first, for the removal of an impediment which prevents the demand for a return of the money from being successful; and, secondly, it is a demand for the repayment of a liquidated sum, and not for unliquidated damages. The register having been rectified, the sums paid by the applicants are clearly provable debts, and the costs of rectifying the register are costs of obtaining an order without which these debts cannot be recovered or admitted to proof. The costs are therefore properly added to the debts provable.

It is hardly necessary to add that the ordinary bankruptcy rule by which the costs of proving debts in bankruptcy have to be borne by the proving creditors (Sched. II., r. 6) has no application to such costs as are in question here. The appeal must be dismissed with costs.

Solicitors: *Cheston & Sons; Wyatt Digby & Co.*

(1) L. R. 8 Ch. 682. (2) 30 Ch. D. 24.

G. I. F. C.

HAYNES *v.* DOMAN.

[1899 H. 327.]

C. A.
1899
STIRLING J.
March 17, 22.
C. A.
April 19, 20;
May 8.

Master and Servant—Contract—Restraint of Trade—Reasonableness—Limit of Space — Limit of Time — Injunction — Evidence of Reasonableness inadmissible.

An agreement made in 1894 between the plaintiff, a hardware manufacturer at Dudley, and the defendant, a young man of twenty-four, on the defendant entering the plaintiff's service, contained a restrictive clause that the defendant would not, during his service or after the determination thereof, divulge to any person the secrets of the plaintiff or the mode of conducting his business, or any part thereof, or any information with regard to the same, or after the determination of such service work for or serve any other person or firm carrying on the same kind of business, or any part thereof, within a radius of twenty-five miles from the plaintiff's works at Dudley, without his consent. In 1897 the defendant left the plaintiff's service, and in 1899, without his consent, entered the service of a firm carrying on a business similar to that of the plaintiff about three miles from his works.

In an action by the plaintiff against the defendant to restrain him from continuing in the service of the firm, and from any further breach of the agreement:—

Held, by the Court of Appeal, affirming Stirling J., that the plaintiff was entitled to an injunction, since the restrictive clause was not void either as being unreasonable for the plaintiff's protection, or as being unlimited in point of time and so binding the defendant during his whole life.

In an action by a trader against his servant for breach of a contract restricting him from serving a rival trader, evidence from persons in the trade giving their views as to the reasonableness or unreasonableness of the contract is inadmissible, since the reasonableness of a contract depends on its true construction and legal effect and is consequently a question for the Court alone.

The validity of agreements in restraint of trade discussed.

THE plaintiff, Charles Haynes, was a hardware manufacturer and factor carrying on business, under the firm of Samuel Lewis & Co., at Dudley, Worcestershire, in the district known as the Black Country. The business appeared to be of a comprehensive character, the articles of manufacture ranging from anchors for battleships to rabbit-traps and tin-tacks. In and for some time prior to 1894 the plaintiff had in his employ as traveller and manager a man named Alfred Doman, who had a

C. A. 1899 HAYNES v. DOMAN.

son, the defendant Alfred Doman the younger. Both father and son lived together, the son being employed as traveller and manager to a firm carrying on a business in the neighbourhood somewhat similar to that of the plaintiff. In 1894 the father, it appeared, was contemplating retirement from the plaintiff's employ after some short further service, and his son, the defendant, apparently in the hope of eventually becoming his successor, proposed to the plaintiff to leave his existing employment and to enter the plaintiff's service, being content to do so at first in a subordinate capacity. This led to an agreement being entered into between the plaintiff and the defendant on April 2, 1894, by which the defendant agreed to serve the plaintiff in the capacity of "clerk, &c.," in the plaintiff's business (therein described as that of a hardware manufacturer and factor) at wages to be mutually agreed upon, the engagement to be determinable by either of the parties giving to the other of them a fortnight's previous notice. Clause 2 ran as follows: "The said Alfred Doman junior, in consideration of the said Charles Haynes so engaging him as aforesaid, hereby agrees that he will not during his said service and employment, or after the determination thereof by notice, discharge, or otherwise howsoever, make known or divulge to any person or persons the secrets of the said Charles Haynes, or the mode or principle used or adopted by him in the said business, or any part thereof, or any information whatever with regard to the same, or during or after the determination of such service as aforesaid work for or serve any other person or persons, company, or firm carrying on or engaged or dealing in the same kind of business, or any part thereof, within a radius of twenty-five miles from the works of the said Charles Haynes without the written sanction of the said Charles Haynes." The wages which it was arranged the defendant should commence with were 15*s.* a week. At the date of the agreement he was about twenty-four years of age. Through his previous employment in the Black Country he had acquired a knowledge of the mode in which the hardware business was carried on in that district. He continued in the plaintiff's service until February, 1897, by which time his wages had been raised to 28*s.* per week. He

then left the plaintiff's employment and went to London. In the course of 1898 he returned to the Black Country, and early in 1899 entered into the employment of Messrs. Benjamin Priest & Sons, who carried on a similar business to that of the plaintiff at Old Hill, Staffordshire, their works being about three miles from the plaintiff's, and the firm being competitors in trade with the plaintiff; at the same time he endeavoured to persuade some of the plaintiff's employees to enter the service of that firm. Of this the plaintiff complained as being a breach of the defendant's agreement, and thereupon he brought this action and now moved for an interim injunction to restrain the defendant from working for or serving Messrs. Benjamin Priest & Sons, or any other person, persons, company, or firm carrying on or engaged or dealing in the business of a manufacturer and hardware factor, or the same kind of business as the plaintiff, or any part thereof, within a radius of twenty-five miles from the works of the plaintiff at Dudley.

The motion came on before Stirling J. on March 17, 1899. It appeared from the evidence that during the period of the defendant's employment by the plaintiff he acquired a considerable knowledge of the plaintiff's business and the secrets of his trade.

Upjohn, Q.C., and *Dunham*, for the plaintiff. The question is whether the stipulation in restraint of trade in this case is invalid as being wider than is required for the reasonable protection of the plaintiff. We submit that the restriction is not unreasonable having regard to the evidence adduced by the plaintiff of probable injury to his trade. Whatever might have been the result twenty years ago, having regard to the more recent authorities, it cannot now be held that such a restriction as this is void for unreasonableness: *Mills* v. *Dunham* (1); *Dubowski & Sons* v. *Goldstein* (2); *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.* (3); *Underwood & Son* v. *Barker*. (4)

Jenkins, Q.C., and *T. B. Napier*, for the defendant. The

(1) [1891] 1 Ch. 576.
(2) [1896] 1 Q. B. 478.
(3) [1892] 3 Ch. 447.
(4) [1899] 1 Ch. 300.

C. A. 1899 HAYNES v. DOMAN.

covenant is wider than is reasonably necessary for the protection of the plaintiff. If an injunction is granted in this case, the Court will be going further than what was done in *Underwood & Son* v. *Barker* (1) or in any other case. The restriction here is unlimited as to time, and as to space it is governed by the place of business of the firm, so that the defendant cannot be employed in any capacity anywhere, even outside the prescribed radius, by a firm which carries on business within that radius. It is necessary to consider the effect of the covenant. If it is possible to bring a hypothetical case within its operation and shew that it is unreasonable, then the covenant is invalid. Here a young man who is engaged at a salary of 15*s.* a week is by the covenant shut out for the whole of his life from carrying on the only trade which he knows in this wide district forming the centre of that trade.

In *Ward* v. *Byrne* (2) the agreement was held invalid on the ground that it was unlimited in point of space. This covenant ought not to be enforced, at any rate, upon an interlocutory application.

Upjohn, Q.C., in reply, referred to Pollock on Contracts, 6th ed. pp. 343, 344, and to the following cases: *Dendy* v. *Henderson* (3); *Mumford* v. *Gething* (4); *Harms* v. *Parsons* (5); *Catt* v. *Tourle* (6); *Leather Cloth Co.* v. *Lorsont* (7); *May* v. *O'Neill* (8); *Davey* v. *Shannon* (9); *Avery* v. *Langford* (10); *Mallan* v. *May* (11); *Nicholls* v. *Stretton* (12); *Tallis* v. *Tallis* (13); *William Robinson & Co.* v. *Heuer.* (14)

Cur. adv. vult.

March 22. STIRLING J. (after stating the facts). I accept the law as it is laid down by the majority in the Court of Appeal in the recent case of *Underwood & Son* v. *Barker* (1),

(1) [1899] 1 Ch. 300.
(2) (1839) 5 M. & W. 548.
(3) (1855) 11 Ex. 194.
(4) (1859) 7 C. B. (N.S.) 305.
(5) (1862) 32 Beav. 328.
(6) (1869) L. R. 4 Ch. 654.
(7) (1869) L. R. 9 Eq. 345.
(8) (1875) 44 L. J. (Ch.) 660.
(9) (1879) 4 Ex. D. 81.
(10) (1854) Kay, 663, 667, n.
(11) (1843) 11 M. & W. 653.
(12) (1843) 7 Beav. 42; (1847) 10 Q. B. 346.
(13) (1853) 1 E. & B. 391.
(14) [1898] 2 Ch. 451.

where the law laid down by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1) was applied to a contract of service. It is put shortly thus by Lord Macnaghten (2): "Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." Another proposition which was accepted in the argument was that in this case the burden lies on the defendant of shewing that the agreement or stipulation is unreasonable. Now, upon the question of reasonableness three points were taken. First of all it was said that the limits of space are unreasonably wide, and upon that there is a great conflict of evidence. The burden of proof lying on the defendant, it seems to me that he has not satisfied it, and I cannot, at the present stage, hold the agreement to be unreasonable by reason of the limits of space over which it extends. Secondly it is said that the agreement is unreasonable because there is no limit of time, and that this distinguishes the case from that of *Underwood & Son* v. *Barker* (3), which in its general features it closely resembles. In that case there was a limit of time, I think a period of twelve months. Now, the object of the stipulation is obviously to prevent the matters connected with the plaintiff's business from being disclosed to his rivals in trade. It is clear from the admissions of the defendant himself that he has become acquainted with the names of the plaintiff's customers, which is not an unimportant matter. I think, also, if it were necessary, that I should infer that he has learned something more. With reference to the limit of time, the question arose in the well-known case of *Hitchcock* v. *Coker* (4), in which there was, in a contract of service, a stipulation of a nature similar to this. The restraint

(1) [1894] A. C. 535.
(2) Ibid. 565.
(3) [1899] 1 Ch. 300.
(4) (1837) 6 Ad. & E. 438.

C. A. 1899 HAYNES v. DOMAN. Stirling J.

was limited as regards space, but unlimited as regards time. The Court of Queen's Bench held that the contract was unreasonable; but the decision was reversed by the Court of Exchequer Chamber, and I will read a few words from the judgment of Tindal C.J. (1): "If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And the only effectual mode of doing this appears to be, by making the restriction of the servant's setting up or entering into the trade or business within the given limit co-extensive with the servant's life." That has been followed in many other cases, and it was pointed out in some of them, particularly in *Mumford* v. *Gething* (2), that one reason why such an agreement is not injurious to the public is that where there are limits as regards space, and there is no limit as regards time, yet the public can have the benefit of the services of the person who has entered into the covenant outside the restricted area. Here, again, the burden of proof being as before, I come to a conclusion favourable to the plaintiff. Then, thirdly, it is said that the contract is unreasonable inasmuch as it prohibits the defendant from entering into the service of any other person within the limits in any capacity whatever. The defendant served as a clerk. He is now acting as a traveller, and it is said, even if he were prohibited from so acting, there are many other capacities in which he might serve other persons. But it seems to me that effect cannot be given to that con-

(1) 6 Ad. & E. 454. (2) 7 C. B. (N.S.) 305.

tention. The real reason why these contracts are made is to prevent the disclosure of the secrets of the plaintiff's business to other persons rivals in trade. If once it were held permissible that a person who had entered into such a contract as this should serve in any capacity at all, an end would be put to all such agreements, for it would be practically impossible to prevent such a person once in the employment of a rival in trade from communicating to that rival the information at his disposal. In my judgment, therefore, at this stage of the action, the defendant has not made out such a case as entitles him to relief from the obligations of the agreement into which he has entered; and on the balance of convenience and inconvenience, I think that the injunction ought to go, the plaintiff giving the usual undertaking as to damages.

G. A. S.

The defendant appealed.

C. A.

The appeal was heard on April 19 and 20, 1899.

Upon the hearing it was agreed that the appeal should be treated as if it were an appeal from a perpetual injunction granted at the trial of the action, so that, in effect, the case might be finally disposed of. For this purpose it was agreed that on the hearing of the appeal certain new affidavit evidence should be used in addition to that before the Court below. The evidence on both sides was exceedingly voluminous, and included affidavits by persons in the hardware trade stating their views as to the reasonableness of the restriction in question.

Jenkins, *Q.C.*, and *T. B. Napier*, for the defendant, the appellant. The question here is, as in *Underwood & Son* v. *Barker* (1), whether the covenant is wider than is reasonably required for the protection of the covenantee. We say it is, for it practically prohibits the defendant, a young man receiving small wages, from earning his livelihood and working in any capacity in the hardware trade within this large area of twenty-five miles in every direction from the plaintiff's works—

(1) [1899] 1 Ch. 300.

C. A. 1899 HAYNES v. DOMAN.

that is, within a district in which the principal hardware trade in England is carried on—and that for his whole life. That, we contend, is an unreasonable restriction, and one far beyond what was decided in the case cited. (1) Moreover, even if the restriction could be considered reasonable as applied to present circumstances, it is quite possible to conceive that cases might arise in which it would be clearly unreasonable; and that being so, the restriction must be regarded as void, at all events on that ground. The learned judge below relied on *Hitchcock* v. *Coker* (2) as being against the defendant; but there the covenant was not to carry on a chemist's business within three miles of the town of Taunton, a limit of space which the Court might well consider reasonable. As pointed out by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3), in a passage quoted in the *Underwood Case* (4): "All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case." Here, we submit, the restriction on the defendant's liberty of action goes beyond what is justified by the circumstances, and is unreasonable in reference to the interests of either party, and is therefore void as having no binding effect at all. At any rate, even if it may be considered reasonable as regards limit of space, it is clearly unreasonable in that it covers the defendant's whole life.

Upjohn, *Q.C.*, and *Dunham*, for the plaintiff, the respondent. The test of reasonableness of the covenant is not to consider every possibility which might happen under the agreement, but what was contemplated by the parties.

[RIGBY L.J. The defendant might have been dismissed a fortnight after the employment began. Would it be reasonable in such a case?]

It would be difficult to fix a moment during the employment

(1) [1899] 1 Ch. 304, 307, 308.
(2) 6 Ad. & E. 438, 453–4.
(3) [1894] A. C. 535, 565.
(4) [1899] 1 Ch. 304.

at which the relationship between the master and servant would become confidential, so that the employer could validly take from his employee a covenant of this kind. There is no evidence that the defendant was not on confidential terms from the first. There is evidence, on the other hand, that every trader in the prescribed district is a potential rival of the plaintiff; and he is entitled to a restrictive covenant which will prevent his servant after having become acquainted with his special methods of trade from going over to a rival, and communicating to him those methods. The object of a stipulation of this kind is to enable an employer to deal openly with his employees without fear or risk of his competitors getting hold of his trade secrets: *Mumford* v. *Gething*. (1)

[RIGBY L.J. In *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.* (2) Chitty J. points out that the nature of the employment may make a very great difference in considering the question of reasonableness.]

No doubt; and here the defendant's father was in the plaintiff's employment and in possession of all his trade methods. Under the circumstances, there was nothing oppressive or unreasonable in the covenant which the plaintiff took from the defendant. It is said that a covenant of this sort entered into by a mere clerk at 15*s*. a week must be regarded as unreasonable; but the defendant entered the plaintiff's service with the prospect of becoming a traveller. Is a fresh contract to be entered into at every stage of the employment? That would not be practicable in business. An employer must be allowed to make provision for future developments. If he leaves it to a later stage of the employment to exact a covenant of this sort, he may find that he is too late, and that the mischief against which he wishes to guard himself is already done.

[RIGBY L.J. The law will not assume that every man who leaves the service of one master will betray him to rival traders.]

No. But the master is entitled, as a matter of business, to guard against the possibility of it. We agree that the

(1) 7 C. B. (N.S.) 305. (2) [1892] 3 Ch. 453.

C. A. 1899 HAYNES v. DOMAN.

reasonableness of the covenant must be looked at as at the date of the contract; but all the circumstances of the case must be considered.

As to space, no doubt the covenant is somewhat ambiguous. The principles upon which the Court will act in construing such a covenant are stated in *Mills* v. *Dunham* (1); and in a case of ambiguity the rule is to construe it ut res magis valeat quam pereat; just as in cases with reference to perpetuities: *Pearks* v. *Moseley*. (2) The true construction of the covenant is that the defendant is precluded from working for or serving any person carrying on business within the prescribed radius. Such a covenant is reasonably necessary for the plaintiff's protection: *Nicholls* v. *Stretton* (3); *William Robinson & Co.* v. *Heuer* (4); *May* v. *O'Neill* (5); *Dubowski & Sons* v. *Goldstein* (6); *Baines* v. *Geary* (7); *Parsons* v. *Cotterill* (8); Pollock on Contracts, 6th ed. p. 344. Again, there is nothing unreasonable in a covenant of this kind being for the period of the employee's life. Where is the line to be drawn? It is shewn in this very case that two or three years would not be enough, because the defendant went away for two years, and when he returned to the district he endeavoured to interfere with the plaintiff's trade by inducing his servants to leave and take service with Priest & Co. There is no difference in substance, so far as the defendant is concerned, between a restriction for ten or fifteen years and a restriction for life. On the other hand, there is considerable benefit to the plaintiff: Matthews on Restraint of Trade, p. 248; *Chesman* v. *Nainby* (9); *Hitchcock* v. *Coker* (10); *Mumford* v. *Gething* (11); *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.* (12); *Underwood & Son* v. *Barker*. (13)

Jenkins, Q.C., in reply.

[RIGBY L.J. Is there any case of this kind where, there

(1) [1891] 1 Ch. 576.
(2) (1880) 5 App. Cas. 714.
(3) 10 Q. B. 346.
(4) [1898] 2 Ch. 451.
(5) 44 L. J. (Ch.) 660.
(6) [1896] 1 Q. B. 478.
(7) (1887) 35 Ch. D. 154.
(8) (1887) 56 L. T. 839.
(9) (1727) 2 Ld. Raym. 1456; 2 Str. 739; 1 Bro. P. C. 234.
(10) 6 Ad. & E. 438.
(11) 7 C. B. (N.S.) 319, 320.
(12) [1892] 3 Ch. 447.
(13) [1899] 1 Ch. 300.

being a limitation as to space, the contract has been avoided on the ground of there being no limitation as to time?]

I am not aware of any; but I submit that the absence of such limitation is an important element to be considered. If this covenant be upheld, it will be going further than any of the reported cases. In *Underwood & Son* v. *Barker* (1) the restriction was only for twelve months. Here it is practically unlimited as to space, and absolutely so as to time.

[ROMER L.J. referred to *Parsons* v. *Cotterill.* (2)]

The defendant there was acting as traveller for a wine and spirit merchant at Burton-on-Trent. Burton-on-Trent is no doubt an important centre of the liquor trade, but it is not an isolated seat of that particular trade, as the Black Country is of the hardware trade. I submit that this covenant is altogether oppressive and cannot be enforced.

Cur. adv. vult.

May 8. LINDLEY M.R. (after stating the facts and reading the provisions of the agreement). Looking at the case broadly, and passing over for the moment one or two objections to it, which I will consider later on, I see nothing in this agreement which makes it void. The meaning of it is not so clear as it might be; but, construe it as you will, it only prohibits the defendant from having dealings in the way of the plaintiff's business with a limited class of persons without the consent of the plaintiff. The business of hardware manufacturer and factor is not confined to the district mentioned in the agreement, and there are plenty of people in that business elsewhere whom the defendant can join if he pleases. The prohibition against disclosing secrets is practically worthless without the restriction against entering the employ of rivals. The agreement no doubt, binding the defendant not to do certain things, and being unlimited as to time, binds him for his life, and this gives rise to a difficulty which I will consider presently. But it is very remarkable that no case can be found in which an agreement in restraint of trade, free from objection in other respects, has been held void simply because its duration was

(1) [1899] 1 Ch. 300. (2) 56 L. T. 839.

C. A. 1899 HAYNES v. DOMAN. Lindley M.R.

not restricted. This point has often been considered, notably in *Hitchcock* v. *Coker*. (1) In *Underwood & Son* v. *Barker* (2) this Court had occasion to consider the law applicable to cases of this description, and I shall content myself by referring to what I then said for my view of the law in general.

But the present case presents one or two peculiarities to which it is necessary to allude. In the first place, there are affidavits from persons in the trade, stating their views of the reasonableness of the restrictive clause on which this case turns. The introduction of this class of evidence is a novelty. In my opinion it is inadmissible, and ought not to be attended to. Evidence from persons in the trade is admissible to inform the Court of its nature, and of what is customary in it, and of anything requiring attention in the mode of conducting it, and of any particular dangers requiring precautions, and what precautions are required in order to protect a person carrying on the business from injury by a person leaving his service. But the reasonableness of a contract depends on its true construction and legal effect, and is consequently a question for the Court, and on such a question the opinion of witnesses is out of place.

Another matter which requires attention is whether a restriction on trade must be treated as wholly void because it is so worded as to cover cases which may possibly arise, and to which it cannot be reasonably applied. The appellant's counsel strenuously contended that, even if the restriction could be regarded as reasonable in the events which have happened, and in the great majority of cases likely to happen, yet, if others could be suggested to which it would be unreasonable to apply the restriction, it must be held void in toto. This contention has been considered and repudiated when the restriction is so worded as to be divisible into distinct portions, not depending on each other. In all such cases the restriction is not held void in toto, but is held to be good so far as it is free from objection, and bad only as to those parts which are objectionable. *Mallan* v. *May* (3) is the leading

(1) 6 Ad. & E. 438. (2) [1899] 1 Ch. 300.
(3) 11 M. & W. 653.

case on this point. This principle gets over any difficulty arising from the introduction of the words "or any part thereof"; and the same principle is, in my opinion, also applicable to cases not contemplated, and to which it would be unreasonable to apply the restriction. I am not considering restrictions so worded as to be partly good and partly bad, and in which the good parts are dependent on the bad. Such restrictions are void in toto, the bad parts infecting and destroying the whole. *Perls* v. *Saalfeld* (1) is a modern instance of such a restriction, and my observations do not apply to such cases.

Agreements in restraint of trade, like other agreements, must be construed with reference to the object sought to be attained by them. In cases such as the one before us, the object is the protection of one of the parties against rivalry in trade. Such agreements cannot be properly held to apply to cases which, although covered by the words of the agreement, cannot be reasonably supposed ever to have been contemplated by the parties, and which on a rational view of the agreement are excluded from its operation by falling, in truth, outside, and not within, its real scope. But, even if some extreme case of a technical breach producing no injury to the party to be protected could be proved, sound principle requires, not that the agreement should be held void in toto, but only so far as it is really unreasonable. Even if the restriction could not be so construed as to exclude such a case, no jury would give the plaintiff any damages, and no judge would grant him an injunction. In such an extreme case the defendant is sufficiently protected against oppression without holding the agreement void in toto, and I am unable to see that public policy requires more. The last words used by Lord Macclesfield, in giving judgment in *Mitchel* v. *Reynolds* (2), were: "In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be

(1) [1892] 2 Ch. 149. (2) (1711) 1 P. Wms. 181, 197.

C. A. 1899 HAYNES v. DOMAN. Lindley M.R.

maintained." This is good law and good sense, and, adopting it as a guide, it leads to the conclusion that the Court ought not to hold a just and honest agreement void, even when to enforce it would be just, simply because the agreement is so unskilfully worded as apparently, or even really, to cover some conceivable case not within the mischief sought to be guarded against. Public policy does not require so serious a consequence to be attached to a mere want of accuracy in expression. To hold such an agreement wholly illegal and void is to lose all sense of proportion, and is not necessary for the protection either of the defendant or of the public. This conclusion is warranted by the judgments of the Court in *Rannie* v. *Irvine* (1). Tindal C.J. there said (2): "If, however, the contract is a reasonable one at the time it is entered into, we are not bound to look out for improbable and extravagant contingencies in order to make it void." The other judges expressed their opinions to the same effect; and this view was approved by Lord Macnaghten in *Nordenfelt's Case*. (3)

To prohibit the defendant in this action from engaging in business, such as is carried on by the plaintiff, with the limited class of people mentioned in the agreement, without the written sanction of the plaintiff, is, in my opinion, quite reasonable in all the events which I can suppose the parties to have contemplated. Possible cases in which the restriction would not be reasonable are suggested. One would have arisen if the defendant had left the plaintiff's employ within a very short time after entering it, and before the defendant could have acquired or carried away with him any knowledge of the plaintiff's mode of conducting his business. Such an event has not happened, and clearly was not contemplated. This objection, if sound, would invalidate all agreements of the sort determinable on short notice, unless some words were introduced excluding their application to cases never contemplated. Another case to which the restriction could not be reasonably applied would have arisen if the defendant had left business altogether, or had had no dealings with the plaintiff's rivals for

(1) (1844) 7 Man. & G. 969. (2) 7 Man. & G. 976.
(3) [1894] A. C. 574.

twenty or thirty years, and had then resumed business and assisted them. Even if such cases could be properly regarded as breaches of the agreement, we are not bound to hold the agreement void in toto because it would extend to such extremely unlikely events. No decision forces us to go so far. There is authority against it, and on principle such an unreasonable conclusion ought not to be held to be law.

The defendant is in the wrong. He is deliberately doing what he plainly agreed not to do. The injunction granted must be made perpetual, adding "without the written sanction of the plaintiff." The defendant must pay the costs, both of the action and of the appeal. The consent given in Court to treat this as an appeal from a judgment at the trial must be mentioned in the order.

RIGBY L.J. In this case I agree with the conclusion arrived at by the Master of the Rolls. [His Lordship then stated the facts, observing that the defendant was living with his father, who occupied, in the plaintiff's employment, the confidential post of traveller and manager, a position through which he had become acquainted with the plaintiff's customers and trade secrets; that the plaintiff evidently feared that the defendant, who was in the service of a rival firm, would in conversation with his father acquire knowledge of facts which might give him, and through him the plaintiff's rivals, an undue advantage; and that the plaintiff naturally wished to guard himself from the risk of the knowledge so acquired being used against him, and so declined to continue the employment of the father whilst the son continued in the employ of the rival firm. The son, thinking that it would be to his advantage ultimately to be in the service of the plaintiff, where he might fairly learn all that his father could tell him, offered to serve the plaintiff, and the plaintiff insisted on the defendant entering into the agreement in question as a condition of service. His Lordship then proceeded:—]

This agreement is very far from being a general restraint on the servant carrying on his business. He can enter into the employment of any hardware manufacturer or factor who is

C. A. 1899 HAYNES v. DOMAN. Rigby L.J.

not engaged in business within the twenty-five mile radius mentioned in the agreement; and of course he may enter into the employment of any person or firm anywhere not carrying on the same kind of business as the plaintiff's, "or any part thereof." The extent of the restrictions does not appear to me unreasonable apart from its duration; and, as the Master of the Rolls has pointed out, there is no case in which a partial restraint, otherwise reasonable, has been held unreasonable because of its being unlimited in point of time. I cannot see why a man may not bind himself never to serve with a rival firm carrying on business within a limited radius, as he certainly can bind himself never to deal with a customer for the time being of his own principals.

ROMER L.J. I also have come to the conclusion that this appeal should be dismissed.

The circumstances under which the defendant entered into the plaintiff's employ were such as, in my opinion, to justify the plaintiff in asking the defendant to enter into some agreement of the nature of that enforced in this action. [His Lordship then stated the facts, and, after referring to the agreement, continued:—]

It appears from the very terms of clause 2 to have been contemplated by the parties, and I think the evidence as a whole bears out the view, that, from the nature of the plaintiff's business and of the service in which the defendant was about to be employed, the defendant would by reason of that employment become acquainted with secrets and information relating to the business which ought not to be disclosed to or be at the service of any of the plaintiff's potential rivals in trade. I think it was of great importance to the plaintiff, in taking the defendant into his employ, to make the defendant enter into some contract which would prevent him, on the termination of his employment, from divulging such secrets and information, and from utilising them in the service and for the benefit of the plaintiff's potential rivals. It appears to me reasonable, therefore, for the plaintiff to require the defendant to enter into some such contract as that in clause 2. It is said on behalf of

the defendant that the plaintiff would have sufficiently protected himself by the first part of that clause as to not divulging secrets or information. I think that is a mistake. Without divulging information the defendant, on entering into the service of a rival trader, might consciously or unconsciously use that information for the benefit of that trader to the great injury of the plaintiff; and, moreover, the plaintiff might justifiably and reasonably object to the defendant being placed in a position where his duty to his new master would conflict with his obligations to the plaintiff, and where he would be subject to the continual temptation of using the knowledge of the specialities of the plaintiff's business to further the interests of his new employer. I think, therefore, the plaintiff was entitled to call upon the defendant to enter into some contract as to not entering into the service of rival traders after the termination of his employment by the plaintiff.

The only remaining question then is whether the second part of clause 2 goes beyond what was reasonable. Now it is clear that the restraint thereby placed on the defendant was a limited one. Taking the construction now put upon it by both parties, and which, in my opinion, is correct, it in effect extends only so far as to restrain the defendant from serving any trader who carries on a business like the plaintiff's, namely, that of a hardware manufacturer or factor, "or any part thereof" (which of course means a substantial part), within twenty-five miles of the plaintiff's works—that is to say, from entering the service of any of the plaintiff's potential rivals. Now, no doubt, the radius of twenty-five miles is extensive, but it leaves outside a large area in which the business of a hardware manufacturer and of a hardware factor is extensively carried on. And even within the radius the defendant had left open to him employment in any business not being hardware, and even in any hardware business unless it was the same kind as the plaintiff's, or part of the plaintiff's, business. And, looking at the extensive nature of the business of a hardware manufacturer and factor, it does not appear to me that the limitation placed on the defendant's leaving the plaintiff's employ was unreasonable.

C. A. 1899 HAYNES v. DOMAN. Romer L.J.

But it is said that there ought to have been a shorter period of time during which the defendant was to be bound than his life. I am satisfied, however, that a short period of time would have been wholly insufficient to properly protect the plaintiff. And even after a comparatively long series of years, the position of the plaintiff's business, and the capacity of the defendant to use his knowledge of it to its injury, might well have remained unchanged, so that the plaintiff might have still required protection. And, looking at the average duration of life, and dealing with the question broadly, I do not think on the whole it was unreasonable to put no limitation as to time on the defendant's agreement. It would have been of no practical importance to the defendant to have limited the time to, say, twenty years, and to have freed him after that time. And it is not right in these cases to judge of what is reasonable by a consideration of circumstances not naturally in the contemplation of the parties or likely to happen: as, for example, in the present case, by considering whether the restraint would be reasonable if the defendant lived a long life, and after a considerable number of years, when circumstances had changed and no injury could accrue to the plaintiff, wanted to serve in the prohibited radius; or by considering whether the restraint would be needed if the defendant had ceased his employment before acquiring any real knowledge of the plaintiff's business. In most cases of restraint of trade the master would need no protection if the employment ceased very soon, and yet a consideration of this fact has never in itself induced the Court to hold the restraint unreasonable or void; and I fully agree with what has been said by the Master of the Rolls on this part of the case. I will only add this: where a man of sufficient age and business capacity knowingly enters into a contract of service which is only in partial restraint of trade, I think the onus lies on him to prove that it goes beyond what was reasonably necessary: see *Horner* v. *Graves* (1), where it is stated that "unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering." And see *Rousillon* v. *Rousillon* (2)

(1) (1831) 7 Bing. 735, 744. (2) (1880) 14 Ch. D. 351, 364–5.

where Fry J. shews that the case of *Mallan* v. *May* (1) supports the above view, and adds that it was also his opinion that the burden of shewing that such a restraint was plainly and obviously beyond what the master's interests required rested on the defendant, the servant. And he further said, in effect, that that ought to be the rule of law, because the defendant is seeking to put a restraint upon the freedom of contract, and he who does that must shew that the purposes of freedom of trade require the freedom of contract to be so curtailed. And in *Mills* v. *Dunham* (2) the present Master of the Rolls observes that the contention that you are to treat a restraint of trade as primâ facie bad, and throw upon the person supporting it the onus of shewing that it is reasonable, is introducing a wholly unsound principle into the construction of documents. And other authorities to the same effect might be cited.

In the case before us the defendant has, in my opinion, failed to discharge the onus on him, and on that ground also I think this appeal fails.

Solicitors: *T. A. Dennison & Co., for T. Cooksey, Old Hill; P. W. Chandler, for Hooper & Fairbairn, Dudley.*

(1) 11 M. & W. 653.

(2) [1891] 1 Ch. 576, 586.

G. I. F. C.

NORTH J.
1899
May 12

LORD GIFFORD *v.* LORD FITZHARDINGE.

[1898 G. 1293.]

Tenant for Life and Remainderman—Payment by Tenant for Life of Charge on Inheritance—Reconveyance of Mortgaged Property—Presumption of Intention to keep alive Charge.

A reversionary interest in trust funds was mortgaged by the reversioner. He afterwards on his marriage assigned the same interest (subject to the mortgage) to trustees, on trust for his wife for her life, with remainder to himself for his life, with remainders over. After the marriage he paid off the mortgage debt out of his own moneys, and the mortgagee executed a deed which purported to reconvey the mortgaged property to him "absolutely discharged from" the mortgage debt and all claims under the mortgage deed. The solicitors who prepared the reconveyance were ignorant of the existence of the settlement.

In an action by the reversioner, claiming to have the reconveyance set aside or rectified, he gave evidence that he did not intend to pay off the mortgage debt for the benefit of the settlement, but that he intended to keep the charge alive for his own benefit:—

Held, that, notwithstanding the form of the reconveyance, the plaintiff was entitled to have the charge kept alive for his own benefit, and that the sum secured by the mortgage constituted a charge on the property having priority over the settlement, and a declaration was made to that effect.

Trial of Action.

By a deed dated April 16, 1879, the plaintiff mortgaged his reversionary interest (subject to the life interest of his mother) in certain trust funds to the defendant Lord Fitzhardinge to secure the sum of 1000*l.* and interest thereon.

By a deed dated April 21, 1880, the plaintiff, in contemplation of his then intended marriage with the defendant Sophie Catherine Lady Gifford, assigned his said reversionary interest (together with other property) to trustees (subject to the mortgage debt of 1000*l.*) upon trust to pay the annual income of the trust premises to Sophie Catherine Lady Gifford during her life, for her separate use, without power of anticipation, and from and after her decease to pay the annual income to the plaintiff (if he survived her) for his life, with remainders to the children of the marriage as the plaintiff should appoint, with an ultimate remainder to the plaintiff.

In October, 1896, the plaintiff was desirous of paying off the mortgage debt of 1000*l.* (but not, as he alleged, so as to exonerate the capital of the settled funds), and he requested the mortgagee's solicitors to prepare the necessary deed; but he omitted to inform them of the existence of the marriage settlement, and that it was not his intention to extinguish the mortgage debt for the benefit of the capital of the settled funds.

The solicitors did not know of the existence of the marriage settlement or of the provisions thereof, and they prepared the reconveyance by way of indorsement on the mortgage of April 16, 1879, and the reconveyance purported to reconvey the mortgaged premises to the plaintiff "absolutely discharged from all principal money and interest secured by, and all claims and demands under, the above-written indenture of mortgage." The defendant Lord Fitzhardinge, on October 27, 1896, executed the reconveyance to the plaintiff in the form aforesaid, the plaintiff having on that date duly paid off the mortgage debt of 1000*l.*

The plaintiff alleged that he had only recently discovered the form in which the reconveyance was executed.

The plaintiff claimed—

(1.) To have the reconveyance set aside or rectified.

(2.) To have a proper transfer of the mortgage to him executed by the defendant Lord Fitzhardinge.

There were no children of the marriage.

The plaintiff was examined as a witness, and he stated that he paid off the mortgage out of his own moneys. He did not then consult his own solicitors about it. Shortly before he commenced this action he consulted them, and they pointed out to him that the mortgaged property had been wrongly reconveyed, unless he intended that the 1000*l.* should belong to the settlement. The plaintiff said that he did not intend that the 1000*l.* should go into the settlement; he intended that the charge should remain in his own favour.

The plaintiff was not cross-examined.

Hon. E. C. Macnaghten, Q.C., and *Beddall*, for the plaintiff. The legal presumption is that when a tenant for life pays off a

NORTH J. 1899 LORD GIFFORD v. LORD FITZHARDINGE.

charge on the inheritance he does so for his own benefit. The principle of such cases as *Burrell* v. *Earl of Egremont* (1), *In re Harvey* (2), and *Morley* v. *Morley* (3) applies to the present case. The fact that a reconveyance has been executed does not prevent the Court from giving the relief asked. And it makes no difference that the ultimate remainder is by the settlement limited to the plaintiff.

Beaumont, for Lord Fitzhardinge, took no part in the argument.

S. R. Earle, for the trustees of the settlement and for Lady Gifford, did not oppose the plaintiff's claim.

NORTH J. I accept the plaintiff's statement that he did not intend to pay off the mortgage debt for the benefit of the settlement, but that he intended to pay it for his own benefit. The effect of the conveyance as it stands is that the mortgage is paid off for the benefit of the settlement, and something must be done to neutralize that effect. I think the best plan will be to follow *Burrell* v. *Earl of Egremont* (1), and to make a declaration that, notwithstanding the form of the reconveyance, the plaintiff, as tenant for life, having paid off the mortgage debt out of his own moneys, became and is now entitled to have the charge kept alive for his own benefit, and that the sum of 1000*l.* secured by the mortgage now constitutes a charge upon the property having priority over the settlement. The plaintiff must pay the costs of the action.

Solicitors: *Stevens, Bawtree & Stevens; Jennings & Finch.*

(1) (1844) 7 Beav. 205. (2) [1896] 1 Ch. 137.
(3) (1855) 5 D. M. & G. 610.

W. L. C.

CHARNOCK *v.* COURT.

STIRLING J.

[1899 C. 911.]

1899

March 29; *April* 12.

Trade Union—Strike—"Watching or Besetting"—Interlocutory Injunction—Conspiracy, and Protection of Property Act, 1875 (38 & 39 *Vict. c.* 86), *s.* 7.

Watching or besetting a place where a person "resides, or works, or carries on business, or happens to be," under sub-s. 4 of s. 7 of the Conspiracy, and Protection of Property Act, 1875, does not necessarily imply any lengthened watching, and is not limited to places which he habitually frequents.

During the pendency of a strike two agents of a trade union attended at a landing-stage to await the arrival of a steamer containing workmen imported by the masters from Ireland to replace the men on strike, and, on the arrival of the steamer, they informed the Irish workmen of the strike, and offered to pay their expenses if they would go elsewhere to work:—

Held, (1.) that the attendance at the landing-stage was with a view to compel the masters to conduct their business in accordance with the requirements of the men, and was not in order merely to communicate information; and (2.) that it was a watching or besetting within sub-s. 4 of s. 7 of the Conspiracy, and Protection of Property Act, 1875; and an interlocutory injunction was granted against the officers of the union.

THIS was a motion by the plaintiffs in an action brought by three members of the Union of Master Joiners at Halifax, suing on behalf of themselves and all other members of the union, against the president, the secretary, and one of the members of the executive committee of the Amalgamated Society of Carpenters and Joiners, a trade union registered under the Trade Union Act, 1871, for an injunction to restrain the defendants until the trial of the action from (inter alia) watching or besetting the landing-stage at Fleetwood or the railway station at Halifax, or the works of the plaintiffs or any of them, or of any other member of the masters' union, or the approaches thereto, or the place of residence of any workman employed by or proposing to work for the plaintiffs or any of them, or any other member of the said union, for the purpose of persuading or otherwise preventing persons from working for the said union or any member thereof, or for any purpose except merely to obtain or communicate information. The writ was

STIRLING J. 1899 CHARNOCK v. COURT.

subsequently amended by making all the members of the masters' union plaintiffs.

The litigation arose out of a strike amongst the journeymen carpenters at Halifax, which began on January 22, 1899, and was still continuing. To replace the men on strike the masters imported workmen from other places, and in particular from Belfast. The men from Belfast were procured by the intervention of a Mr. Forster. On February 20 he sent nine men by steamer to Fleetwood, and thence by rail to Halifax; and on February 21 he sent a further batch of thirteen men by the same route, each of them having first signed a document which purported to bind him to work as a non-union man for the masters' union at Halifax upon certain terms for a period of twelve months. The nine men arrived at Halifax on February 21, and were seen at the station by the president of the men's union, who spoke to some of them about the strike, and in the result two only of the men began work in Halifax. The thirteen men arrived at Fleetwood by steamer on February 22 on their way to Halifax, and were met on the landing-stage by two men named Walker and Wadsworth, who had been sent to Fleetwood by the men's union on the previous day. Acting under the instructions of their union, Walker and Wadsworth spoke to the Belfast men about the strike, and informed them that if instead of proceeding to Halifax they would go to other places to work, their expenses would be paid and work would be found for them, and they provided several of the men with tickets to Morecambe and Glasgow, and also with money for one night's lodging. These expenses were paid out of a sum provided for the purpose by the secretary of the men's union. The result was that four only of the thirteen men ever undertook work at Halifax.

Upjohn, Q.C., and *R. J. Parker*, for the plaintiffs. There has been a watching or besetting by the defendants in this case within sub-s. 4 of s. 7 of the Conspiracy, and Protection of Property Act, 1875 (1), as interpreted by the Court of Appeal

(1) Sect. 7 of the Conspiracy, and Protection of Property Act, 1875, provides as follows:—

"Every person who, with a view to compel any other person to abstain from doing or to do any act which

in *J. Lyons & Sons* v. *Wilkins*. (1) That case shews that, in order to bring the case within the proviso at the end of s. 7, the onus is on the defendants to prove that what was done was merely for the purpose of communicating information.

The landing-stage at Fleetwood and the railway station at Halifax are places where the workmen happened to be within sub-s. 4.

Jenkins, Q.C., Godefroi, and *W. L. Richards,* for the defendants. The words "or other place where he happens to be" must be construed by reference to the words immediately preceding, and do not include a place to which the general public have access, such as a landing-stage or a station. There has been here no compulsion on the part of the defendants. This action is founded on a penal offence, and is analogous to an action for libel, where it has been frequently laid down that the Court will not interfere on motion except in a very clear case. Before granting an injunction the Court must see whether the facts would warrant an indictment.

Upjohn, Q.C., in reply. With regard to the question of compulsion, it is the compulsion of the masters which is to be looked at: see the form of injunction in *J. Lyons & Sons* v. *Wilkins*. (2) Here the defendants are compelling the masters to conform to their views by depriving them of their workmen.

Cur. adv. vult.

---

such other person has a legal right to do or abstain from doing, wrongfully or without legal authority—

"(4.) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; . . . . shall, on conviction thereof by a court of summary jurisdiction, or on indictment, as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

"Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

(1) [1896] 1 Ch. 811; [1899] 1 Ch. 255.

(2) [1896] 1 Ch. 811.

STIRLING J. 1899 CHARNOCK v. COURT.

April 12. STIRLING J., after stating the facts and referring to s. 7 of the Conspiracy, and Protection of Property Act, 1875, continued as follows:—The construction of the statute has been considered by the Court of Appeal in the recent case of *J. Lyons & Sons* v. *Wilkins*. (1) Two points decided in that case are material for the present purpose. First of all it is decided that watching or besetting is unlawful within the meaning of s. 7, sub-s. 4, unless it is in order merely to obtain or communicate information; and, secondly, that watching or besetting a house or other place where the workmen are is unlawful, if done in order to compel a master to do or abstain from doing what he has a legal right to abstain from doing or to do. Applying the law thus laid down to what took place on the arrival of the steamer at Fleetwood, I think, in the first place, that the attendance of Walker and Wadsworth there was with a view to deprive the masters of the assistance of workmen brought over from Ireland, and so compel them to conduct their business in accordance with the requirements of the men; secondly, I think that their attendance was not in order merely to obtain or communicate information. Walker and Wadsworth went there provided with money which was used to send the Irish workmen to other places, namely, Morecambe and Glasgow. It seems to me that they went there in order to hold out inducements to these men to go elsewhere, and that they did hold out such inducements, and attending at a place to hold out such inducements is, in my opinion, not within the proviso at the end of s. 7.

The next question is whether the case is within sub-s. 4, which prohibits watching or besetting the house, or the place where a person resides, or where he happens to be. It was known or suspected that workmen would arrive at Fleetwood by steamer on February 22. Walker and Wadsworth go there and await the arrival of the steamer, and then enter into communication with the men who land. It seems to me that that is watching a place where the workmen happened to be. There is nothing in the statute which defines the duration of

(1) [1896] 1 Ch. 811; [1899] 1 Ch. 255.

the watching. It may be, it seems to me, for a short time, and as to that I refer to the words of the proviso itself, which speaks of attending at or near a house or place where the person resides, or works, or happens to be. The word "attending" does not necessarily imply any lengthened attendance upon the spot; nor is there anything in the statute to limit its operation to a place habitually frequented by the workman, such as the house where he resides or the place where he works. On the contrary, the words "place where he happens to be" seem to me to embrace any place where the workman is found, however casually. [His Lordship then considered the question whether the defendants were liable for the acts of Walker and Wadsworth, and came to the conclusion that they were so liable. He then dealt with the case so far as it related to the proceedings at the Halifax Railway Station, and as to that he came to the conclusion that the evidence was too conflicting to enable the Court to grant an interlocutory injunction.

With regard to the proceedings at Fleetwood, he granted an injunction in the following terms: "to restrain the defendants or their agents or persons authorized by them from watching or besetting the landing-stage at Fleetwood, or any other place to which any person or persons employed or about to be employed by the plaintiffs or any of them may be brought."]

Solicitors: *Helliwell, Harby & Evershed, for Jubb, Booth & Helliwell, Halifax; Fielder & Fielder, for R. Wilkinson, Halifax.*

H. B. H.

KEKEWICH J.

1899

May 9, 10.

ALLEN *v.* GOLD REEFS OF WEST AFRICA, LIMITED.

[1897 A. 585.]

SAME *v.* SAME.

[1897 A. 977.]

Company — Deceased Member — Registered Address — Notice — Forfeiture of Shares—Alteration of Articles—Retrospective Operation.

Apart from special provisions in their articles of association, a company having notice of the death of a member cannot bind his estate by posting to him at his registered address—

(*a*) A notice preliminary to forfeiting his shares for non-payment of calls due at his death, or

(*b*) A notice of an extraordinary general meeting to be held for the purpose of altering the articles in such manner as to impose a fresh liability on his shares.

New Zealand Gold Extraction Co. v. *Peacock*, [1894] 1 Q. B. 622, and *James* v. *Buena Ventura Nitrate Grounds Syndicate*, [1896] 1 Ch. 456, discussed and applied.

Whether a company can alter their articles for the sole purpose of retrospectively affecting the existing rights of the owner of a particular group of shares without his consent, *quære*.

Witness Actions (Consolidated).

The plaintiffs were the executors of a testator who died on February 4, 1897. At the time of his death the testator was the registered holder of 27,885 fully paid 5*s.* shares issued by the defendants, and 36,435 5*s.* shares with 1*s.* 8*d.* paid up. The amount due for calls at his death was 6072*l.* 10*s.* The amount due for interest on calls in arrear was in dispute.

The defendants' articles provided (art. 29) that they should have a lien for all debts, obligations, and liabilities of any member upon all shares (not being fully paid) held by such member.

On February 9, 1897, the defendants sent out a notice of an extraordinary general meeting to be held on February 18 for the purpose of passing a special resolution to alter art. 29 by omitting the words "not being fully paid."

This notice was sent by post to the testator at his registered address although the defendants were aware of his death. The meeting was held on February 18, and the special resolution passed. Thereupon notice of a confirmatory meeting to be held on March 8 was sent to the same address.

On March 8 the confirmatory meeting was held, and the resolution confirmed. There were in fact no fully paid shares except those belonging to the testator.

On June 4, 1897, the defendants posted a notice to the testator at his registered address requiring payment by June 21 of 6072*l.* 10*s.* due in respect of the 36,435 shares, a sum of 804*l.* 6*s.* 11*d.* for interest on arrears of calls, and further interest from the date of the notice. The notice also stated that in the event of non-payment by the time appointed the shares would be liable to be forfeited. This notice was also sent to the plaintiffs, who had not then lodged the probate for registration. The amount demanded was not paid, and on June 23 the defendants purported to forfeit the shares.

The plaintiffs claimed a declaration that the defendants had no lien upon the fully paid shares, and an injunction to restrain the forfeiture of the partly paid shares. With regard to the forfeiture, they contended (inter alia) that the notice of June 4, 1897, was invalid as claiming too much interest. This depended entirely on a question of fact, namely, as to the exact date when the shares were allotted to the testator. The arguments and judgment on this point are therefore omitted.

The defendants' articles provided (art. 2) that the word "member" should mean a registered holder of any share or stock of the company; (art. 22) that if any member failed to pay any call, instalment, or interest the directors might serve a notice on such member requiring him to pay the same, together with further interest from the date of the notice; (art. 23) that the notice should state that in the event of non-payment the shares would be liable to be forfeited; (art. 24) that if the requisitions of the notice were not complied with, any share in respect of which such notice was given might be forfeited by a resolution of the directors to that effect; (art. 29) that the company should have a lien for all debts, obligations, and

KEKEWICH J.

1899

ALLEN v. GOLD REEFS OF WEST AFRICA, LIMITED.

SAME v. SAME.

liabilities of any member to the company upon all shares (not being fully paid) held by such member; (art. 41) that the executors or administrators of a deceased member (not being one of several joint holders) should be the only persons recognised by the company as having any title to the shares registered in the name of such member; (art. 42) that any person becoming entitled to a share in consequence of the death of any member might elect either to be registered as a holder, or to have some person nominated by him registered as a transferee; (art. 45) that a person so becoming entitled should, subject to any lien of the company, be entitled to receive dividends, bonuses, or other moneys payable in respect of the share, but should not be entitled to receive notices of, or to attend or vote at meetings of the company, or, save as aforesaid, to any of the rights or privileges of the members, unless and until he should have become a member in respect of the shares; (art. 74) that notice of general meetings should be given to such members as were, under the provisions therein contained, entitled to receive notices; but the accidental omission to give such notice to, or the non-receipt of such notice by any member, should not invalidate any resolution passed at any such meeting; and (art. 170) that a notice might be served upon any member either personally, or by sending it prepaid by post addressed to such member at his registered address as appearing in the register of the members of the company.

There was no special provision for service of notices in the case of a deceased member.

Renshaw, *Q.C.*, and *Kerly*, for the plaintiffs. Service at the testator's registered address was ineffectual after notice of his death: *New Zealand Gold Extraction Co.* v. *Peacock* (1); *James* v. *Buena Ventura Nitrate Grounds Syndicate.* (2) An executor of a deceased member is not ipso facto a member: *In re Bowling and Welby's Contract.* (3) With regard to the lien, there is the further objection that articles cannot be altered

(1) [1894] 1 Q. B. 622, 632, 633. (2) [1896] 1 Ch. 456, 465, 467.
(3) [1895] 1 Ch. 663, 670.

so as to retrospectively affect the existing rights of non-consenting members. Such an alteration would be a breach of contract: Buckley on Companies, 7th ed. p. 206: *James* v. *Buena Ventura Nitrate Grounds Syndicate.* (1)

Warrington, Q.C., and *Dunham*, for the defendants. There is no authority as to service in such a case as this. If the dicta cited are followed, there will be a deadlock on the death of every member. This cannot be the law. It is the duty of an executor to receive and attend to notices addressed either to himself or to his deceased testator, the estate being treated as the member for the purpose both of profit and of liability: *Baird's Case* (2): *James* v. *Buena Ventura Nitrate Grounds Syndicate.* (3) In that case the notice was sent to the wrong address. The resolution is not invalidated by non-receipt of the notice (art. 74). The passage in Buckley on Companies, 7th ed. p. 206, as to alteration of articles having no retrospective operation, relates to the issue of preference shares, and is based on *Hutton* v. *Scarborough Cliff Hotel Co. B.* (4), which has been overruled by *Andrews* v. *Gas Meter Co.* (5)

Vested rights were altered in *Pepe* v. *City and Suburban Permanent Building Society.* (6) The liability to such alteration is part of the contract under which shares are held, and there is no substance in this technical objection.

Renshaw, Q.C., in reply. In these articles the word "member" means a "registered holder" exclusively. The definition is more restricted than that contained in s. 23 of the Companies Act, 1862. Art. 74 refers to accidental omissions to give notices, and is not applicable here. In *Pepe* v. *City and Suburban Permanent Building Society* (6) all the members were affected by the alteration in the rules, whereas in the present case the alteration was aimed solely at the testator's shares, none other being fully paid. *Andrews* v. *Gas Meter Co.* (5) does not affect the question of vested rights, and the passage in Buckley on Companies, 7th ed. p. 206, explaining Lord Macnaghten's observations on *Hutton* v. *Scarborough*

(1) [1896] 1 Ch. 466.
(2) (1870) L. R. 5 Ch. 725, 735.
(3) [1896] 1 Ch. 464, 467.
(4) (1865) 2 Dr. & Sm. 521.
(5) [1897] 1 Ch. 361.
(6) [1893] 2 Ch. 311.

KEKEWICH J.

1899

ALLEN v. GOLD REEFS OF WEST AFRICA, LIMITED.

SAME v. SAME.

Cliff Hotel Co. B. (1), in *British and American Trustee and Finance Corporation* v. *Couper* (2), is well founded.

KEKEWICH J., after holding on the facts that the notice threatening forfeiture was invalid as claiming too much interest, continued:—That would get rid of the forfeiture part of the case, and so far as that is concerned I might avoid dealing with the second question; but as the same point arises with regard to the lien I must deal with it. The question is this. Before this notice threatening forfeiture, which I hold to be bad on other grounds, was issued, the testator was dead. The defendants, being aware of his death, served the notice by a registered letter addressed to him at his registered address. They also took the precaution of serving a notice upon the executors. The notice to the executors was not seriously relied on, and the question is whether the notice given to the dead member was sufficient. That is a point which does not arise for the first time, but there is little authority with regard to it, though I think there is sufficient for my purpose. In the interpretation clause of these articles of association there is an interpretation of the word "member." Now, as there is a distinct definition of the word "member" in the Companies Act, 1862, s. 23, I cannot conceive any useful object in attempting to define it in articles of association. However, according to the definition in these articles the word "member" does not mean anything more than what the Act of Parliament in effect says, namely, a registered holder of shares in a company. The person who is holding the share is registered in respect of that share. He is on the register, and though dead he continues for some purposes to be a member through his estate, that estate being represented by executors. The practical question is whether he can be treated as a member for the purpose of giving such a notice as this. Up to a certain point there is no doubt that a notice may be served upon a deceased member. It is settled by *James* v. *Buena Ventura Nitrate Grounds Syndicate* (3) and other authorities, that for many purposes the estate of a

(1) 2 Dr. & Sm. 521. (2) [1894] A. C. 399, 416.
(3) [1896] 1 Ch. 456.

deceased shareholder is entitled to the privileges and subject to the liabilities attaching to the shares which were his when alive. That has been much pressed on me in reference to this particular point; but it seems to me to go a very little way indeed towards deciding it. The question here is whether a company can give a deceased member notice so as to enable them to forfeit his shares and otherwise impose on his estate, not a new liability, but a liability arising out of the articles of association. Now, the Court of Appeal in *New Zealand Gold Extraction Co.* v. *Peacock* (1), having that point before them, agreed with Kennedy J. in recognising the advantage from the commercial and business point of view of holding that notice to a dead man was good if there was nobody else to whom the notice could be given—that is to say, if the company did not know that the man was dead, and served the notice in the ordinary course of business. Lindley L.J. says (2): "The articles are so drawn that they do not provide for dead men, nor for notice to dead men, nor for notice to anybody in the place of dead men. It is said that it is part of the bargain between the shareholders and the company that if a member dies and the company are going on and have no notice of his death, his estate cannot be called upon to pay calls. On the construction of the articles, I think it is obvious that no such bargain was intended." Then, adopting a suggestion in Buckley on Companies, 6th ed. p. 461, note to Table A, clause 12, his Lordship says: "that until notice of his death reaches the company calls may be made in respect of his shares by notices sent to his registered address just as if he were still a member. I have no doubt at all that that is the true construction of the articles. In order not to make these articles absurd, we must hold that a deceased member remains a member until notice is given." It is there implied that when once the company have notice of the death that contention is no longer tenable and cannot be adopted; but Lindley L.J. does not expressly say so. Davey L.J., however, says (3), "I do not think that if they had notice of the death of the member they could rely

(1) [1894] 1 Q. B. 622. (2) [1894] 1 Q. B. 631.
(3) [1894] 1 Q. B. 632.

KEKEWICH J.

1899

ALLEN v. GOLD REEFS OF WEST AFRICA, LIMITED.

SAME v. SAME.

on service upon him at his registered place of address, and nothing that we say in this case touches that question"; and (1), "I am prepared to adopt Mr. Buckley's suggestion, and to hold that a deceased member or his estate remains a member for the purpose of the articles so long as his name remains on the register without notice to the company of his death." I observe that he says (2): "It is the duty of the representatives of a deceased member to give notice of his death to the company at the earliest possible opportunity; and if they wish the company not to go on treating him as still on the books, it is the duty of the executors to give notice to the company of their desire to become members in his place." I am not quite sure that I appreciate the full meaning of that proposition, and there are some practical difficulties in its application, but it does not alter at any rate what he says in the other passages I have read; and I take it, therefore, to be the opinion of the Court of Appeal that when once the company have notice of the death of a member they cannot serve notices of calls on him so as to bind his estate. This case was both cited and commented on in *James* v. *Buena Ventura Nitrate Grounds Syndicate* (3), where the point was again discussed. Lord Herschell says (4): "It is no doubt the fact that, strictly speaking, although Mr. James's name was, at the time of the resolution of April, 1893, still on the register, he was not, being dead, a member of the company. It seems to me, however, perfectly clear that the word 'member,' as used in some of the articles of the company, must be held to include those whose names are on the register, though they are no longer living." That has been quoted to me as an opinion expressed by Lord Herschell in the Court of Appeal—that a deceased member was still a member for all purposes; but Lord Herschell expressly limits his proposition to the purposes of certain articles. Rigby L.J. deals with the point in this way (5): "The liability for calls exists notwithstanding the fact that the required notice cannot effectually be given to a

(1) [1894] 1 Q. B. 633.
(2) Ibid. 632.
(3) [1896] 1 Ch. 456.
(4) Ibid. 464.
(5) [1896] 1 Ch. 467.

dead man, because it may be given to his representatives; though, if the company is not aware of his death, notice served at his registered address is sufficient when the articles provide for such service upon members"; and for that proposition he cites *New Zealand Gold Extraction Co.* v. *Peacock*. (1)

I think, therefore, that the Court of Appeal, in deciding *James* v. *Buena Ventura Nitrate Grounds Syndicate* (2), did not in the least intend to depart from the *New Zealand Gold Extraction Co.* v. *Peacock* (1), but adopted it; and I therefore take those two decisions as distinctly saying that a company cannot, after notice of the death of a member, effectually serve a notice of call upon him so as to bind his estate, and the same principle must apply to a notice preliminary to forfeiture.

In these articles of association, as in many others, there are provisions with regard to what is to be done upon the death of a member, so as to put his executors in the position of taking or becoming entitled to the benefit of his shares. The difficulty, of course, always is that if there is any liability attaching to them the executors are not disposed to become members. The articles, therefore, provide that they may if they choose do so, or they may have a nominee registered. That, of course, is done by means of a transfer. The nominee may be a transferee for value, or possibly he may be paid for taking the liability. Mr. Buckley in his comments upon Table A points out the necessity of carrying the articles further. He says, on p. 497 of the 7th edition of his book: "To escape the disadvantage under which the company is thus placed in having for holders of its shares merely representative members, whose liability is limited by the amount of the assets of their testator, provisions have been commonly introduced into articles of association putting upon executors a pressure either to transfer their testator's shares, or to become in their own persons proprietors in respect of them, by attaching the penalty of forfeiture to a neglect to do either one or the other within a limited time." According to my recollection, the Crown used to insist on a special clause in the articles of association of the old chartered companies providing that the executors must come in within a certain time,

(1) [1894] 1 Q. B. 622. (2) [1896] 1 Ch. 456.

KEKEWICH J.
1899
ALLEN v. GOLD REEFS OF WEST AFRICA, LIMITED.
SAME v. SAME.

and there was a very strong power given to the company to refuse to pay any dividend if they did not come in. If they were prosperous companies, that soon had an effect upon those who were interested in the benefits under the testator's estate; but there is no such clause here, and, as far as I am aware, it is not common now to insert it. That, no doubt, places the company in a difficulty. They cannot call on the executors to come in and take the shares themselves, or transfer them to a nominee, and they cannot give a notice to the dead man. I cannot help that. I think it would be a very bad precedent to say that because a company are brought to a deadlock by their constitution they can give notice to a dead man after notice of his death.

On this ground, I think the notice threatening forfeiture was bad as well as upon the other ground with which I have already dealt.

I now come to the question of lien. The testator held fully paid shares which by art. 29 were excepted from the lien otherwise given to the company for a sum due from the shareholders, and it has been contended that art. 29 was in the nature of a contract giving the testator an advantage of which he could not be deprived by a special resolution. The testator was, however, under a liability to have the articles of association varied by special resolution, and I think that *Pepe* v. *City and Suburban Permanent Building Society* (1) indirectly, if not directly, shews that the liability to have any article of association altered by a special resolution cannot be got rid of by calling it a contract. It is an integral part of the contract that the articles may be altered by special resolution, and I feel no difficulty on that point. But the notice of the meeting at which the special resolution was passed was sent to the testator after the defendants knew he was dead. Without repeating my remarks on the service of the notice threatening forfeiture, I hold on the same grounds that there was no effectual service of this notice.

There is, however, a further point with regard to the lien. It was contended that it was a technical point without any substance, but it seems to me that there is much substance in

(1) [1893] 2 Ch. 311.

it. The testator was the only holder of fully paid shares; he owed the defendants a considerable sum in respect of his partly paid shares, and, obviously, the only object of passing this special resolution was to enable the defendants, by means of a lien on his fully paid shares, to get payment of what was due on his partly paid shares, for there were no other holders of fully paid shares. It seems to me, therefore, that there is a good deal of substance in the question whether the defendants could in that way alter the articles of association as against this dead man. I will not express a definite opinion about the retrospective value of this resolution, but I take the liberty of saying that Rigby L.J.'s remarks in *James* v. *Buena Ventura Nitrate Grounds Syndicate* (1) commend themselves as well to my common sense as to my ordinary views of justice. He says (2), "Even if this were not so, no majority of the shareholders, even by special resolution purporting to alter the regulations of the company, could retrospectively affect, to the prejudice of non-consenting owners of paid-up shares, the rights already existing under article 27." That part of the case has not been so fully argued, and, as it might give rise to some further consideration, I will not decide the case on that ground, because there is sufficient for my purpose on other grounds; but, apart from very express language in the articles, I think it would be unjust to hold that all the other members of a company can meet together and say, not only that the articles of association shall be altered, but that the fully paid-up shares which one, and only one, member holds, shall be liable as from a certain day to a lien to secure payment to the company of a debt for which up to that moment there is no security. That point may deserve further consideration, but I think the Court ought to struggle to prevent such injustice if it can find even a technical ground for doing so.

Solicitors: *Kerly, Son & Verden; Mayo & Co.*

(1) [1896] 1 Ch. 456. (2) [1896] 1 Ch. 466.

G. R. A.

BIBL. LONDIN UNIV.

KEKEWICH J.
1899
May 12.

In re ANTHONY BIRRELL PEARCE & CO. DOIG *v.* ANTHONY BIRRELL PEARCE & CO.

[1899 A. 632.]

In re SAME. GROOS *v.* SAME.

[1899 A. 636.]

Practice—Evidence—Interlocutory Motion—Information and Belief—Insufficient Affidavit—Rules of Supreme Court, 1883, *Order* XXXVIII., *r.* 3.

An affidavit of information and belief founded on statements made to the deponent by an informant, who declined to repeat them on affidavit unless subpœnaed, was not admitted on an interlocutory motion, in a case where the informant might have been but was not subpœnaed, and no irremediable injury could result from the exclusion of the evidence.

MOTIONS.

These were separate motions in separate actions for the appointment of a receiver and manager on behalf of debenture-holders.

An interim receiver and manager had already been appointed in the action of the plaintiff Doig, which was first in date, and, a further appointment being necessary, the only real contest on these motions was as to which plaintiff should have the conduct of the proceedings.

In order to displace the prior right of the plaintiff Doig to have the appointment made in his action, an affidavit was filed in that action on behalf of the debenture-holders' trustee, one of the defendants, by John Woodhouse, a member of the firm of solicitors acting for the plaintiff Groos, in which the deponent stated that he had the conduct of the plaintiff Groos's action, and continued:—

"I say the statements hereinafter contained are the result of an investigation into the company's affairs which I have conducted on behalf of my client. To the best of my knowledge, information, and belief the whole of such statements are true in substance and in fact."

After setting out a series of statements to the detriment of the plaintiff Doig made to the deponent by William Johnstone on Monday, May 8, 1899, at an interview at which W. H. Norledge, W. Stockbridge, and C. H. Bartle were present, and which were taken down by C. H. Bartle in shorthand, the affidavit proceeded :—

"The said Johnstone informed me that he still had business dealings with the plaintiff Doig, on which he would see him during his stay in London. I made an appointment for him to call at my office at 3.30 on the next day, Tuesday, the 9th May, to swear an affidavit in accordance with his statement, and he promised to do so, but expressed a wish to shield the plaintiff Doig as much as possible. I am informed and believe that he called during the morning of the next day (Tuesday) at the office of Messrs. Norledge and stated that he should not call on me as he had changed his mind, and would not swear the affidavit. He has accordingly not called on me."

A subsequent affidavit was similarly filed by W. H. Norledge, W. Stockbridge, and C. H. Bartle, in which W. H. Norledge deposed :—

"On Wednesday, the 10th May instant, the said William Johnstone called on me and said that the statement he had made to the said John Woodhouse on the 8th instant was perfectly true, and he would make it on oath if subpœnaed, but as he had consulted a relative who was a lawyer, who had advised him not to make an affidavit, he must respectfully decline to do so at this stage. Moreover, that he, the said William Johnstone, had business transactions with the plaintiff John Burn Doig, and he did not wish to do anything to cause the said John Burn Doig to fall out with him and so prejudice his business with him."

Johnstone was not subpœnaed, and made no affidavit.

The question was whether Woodhouse's affidavit was admissible on the present interlocutory application under Order XXXVIII., r. 3, which provides : "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."

KEKEWICH J.

1899

ANTHONY BIRRELL PEARCE & Co., *In re.*

DOIG *v.* ANTHONY BIRRELL PEARCE & Co.

SAME, *In re.*

GROOS *v.* SAME.

Warrington, Q.C., and *Mark Romer*, for the plaintiff Doig. The affidavit is not admissible as information and belief of statements that Johnstone has declined to swear. He ought to have been subpœnaed.

P. O. Lawrence, Q.C., and *Ryland*, for the plaintiff Groos. The affidavit is admissible, the objection, so far as tenable, only affecting the weight. Johnstone merely refuses to make an affidavit because he is hostile to us, not because his statements are untrue. We could not have obtained an affidavit by subpœna.

Renshaw, Q.C., and *Macaskie*, for the debenture-holders' trustee.

Eustace Smith, for the company.

KEKEWICH J. Seeing the extreme importance of this matter to the plaintiff Groos, I fail to understand why Johnstone was not subpœnaed. Had I been told that he declined to make an affidavit in support of his statements, I should have had no hesitation in directing him to be subpœnaed. That has not been done, and I am asked to admit the affidavit as it stands. In declining to do so I am perhaps going beyond what has been the practice of the Court hitherto, but certainly am following that practice in its substance, and am merely expunging one of the excrescences which have become only too common. The rules of evidence are the same in all branches of the High Court, and on the trial of an action what is inadmissible in one branch is inadmissible in another. For the purpose, however, of interlocutory applications, an exception to the strictness of those rules has been introduced in order to make such applications, especially motions for injunctions to restrain injury, effectual. The Court does not admit as evidence that which is not evidence, but, in order to prevent irremediable injury, keep matters in statu quo, and do justice on an interlocutory application, the Court will act on information and belief. That is the origin of the rule. The Court of Appeal recently declined to listen to an affidavit based on information and belief, but not stating the source and grounds thereof. (1)

(1) Vide *Bidder* v. *Bridges*, (1884) 26 Ch. D. 1, and the observations of Kay L.J. in *Bonnard* v. *Perryman*, [1891] 2 Ch. 269, 287.

I invariably reject such an affidavit if it is challenged. Where, however, the source of information is stated, the practice—though possibly a somewhat loose practice—has been to act on the affidavit in order to restrain irremediable injury and to make such order as may be necessary to keep matters in statu quo.

The present affidavit seems to me, not perhaps a new, but certainly an exceptional way of stating the deponent's information and belief. If the deponent had merely said, "I am informed by Johnstone and believe that (setting out Johnstone's statements seriatim)," the affidavit would have been admissible, though it would have been difficult to determine its weight without cross-examination. But resort has been had to a different form. It is stated that Johnstone, for reasons which are immaterial, declines to make an affidavit at this stage, but I am asked to admit his unsworn statements on the ground that the deponent believes them to be true. Though verbally but a small variation from the form above stated, it is a variation of some substance.

During the argument I mentioned the case of an application for an injunction based on a telegram from the country stating that certain trees were about to be cut down that day. I obtained an interlocutory injunction from Jessel M.R. on an affidavit by the London solicitor stating his belief that the facts alleged in the telegram were true. In that case the information on which the belief was founded was distinctly stated, and if the injunction had not been granted, irreparable injury might have been sustained, as the trees would have been cut down.

In the present case, if I appointed a receiver on the application of the plaintiff Doig and new facts were brought before me, the matter would be capable of remedy. The plaintiff Groos might still, if necessary, displace the plaintiff Doig and obtain the conduct of the proceedings. Again, Johnstone, though declining to make an affidavit, was quite willing to be subpœnaed, and he might have been subpœnaed in time for these motions.

The deponent Woodhouse also says, "I am informed and

KEKEWICH J.
1899
ANTHONY BIRRELL PEARCE & Co., *In re.*
DOIG *v.* ANTHONY BIRRELL PEARCE & Co.
SAME, *In re.*
GROOS *v.* SAME.

believe"—without mentioning any source of information—"that he," sc. Johnstone, "called during the morning of the next day (Tuesday) at the office of Messrs. Norledge and stated that he should not call on me as he had changed his mind and would not swear the affidavit." It is not unfair to doubt whether he had not also changed his view of the matter at the same time. The omission to bring him here on subpœna has not been satisfactorily explained.

I must refuse to admit this affidavit so far as it is based on information and belief in Johnstone's statements.

[The motions were ultimately ordered to be put in the list for May 30 and to come on as motions with witnesses, with liberty to the plaintiff Groos to subpœna Johnstone, the interim receiver being continued. The matter was then dealt with on vivâ voce evidence.]

Solicitors: *Nicholson, Graham & Graham; Stanley, Woodhouse & Hedderwick; Norledge & Norledge; James Kirkley.*

G. R. A.

KEKEWICH J.
1899
April 14; *May* 13.

In re GJERS.
COOPER *v.* GJERS.

[1899 G. 277.]

Tenant for Life—Leaseholds—Specific Bequest—Liability to pay Rent and perform Covenants.

A tenant for life of leaseholds, specifically bequeathed by the will of a testator who was assignee of the lease under which the property is held, is bound, during the continuance of her interest, as between herself and the testator's estate, to pay the rent reserved by the lease, and perform the covenants and conditions contained in it.

In re Betty, [1899] 1 Ch. 821, followed.

In re Tomlinson, [1898] 1 Ch. 232, not followed.

ADJOURNED SUMMONS.

John Gjers by his will, dated November 8, 1892, gave, devised, and bequeathed all his real and personal estate to his son

Lawrence Farrar Gjers and Charles Ellison Mills and John Vernon Cooper, upon trust to pay to the said John Vernon Cooper, in case he should act as an executor and trustee of the will, the sum of 250*l.*, and upon trust to pay certain other legacies, and subject thereto the testator gave, devised, and bequeathed all his real and personal estate to his son Lawrence Farrar Gjers.

The testator made two codicils to his will, by the later of which, dated December 9, 1897, after certain recitals, he proceeded as follows: "I leave to my wife my leasehold house known as Bournewood, and all the contents of the same, including all my plate linen china glass books pictures prints wines liquors furniture and other household effects, and all my carriages and horses, but except money and securities for money, for her life or so long as she shall remain my widow, and from and immediately after her death or second marriage, whichever event shall first happen, I give and bequeath the same to my daughter Hilda absolutely free from the marital control of any husband to whom she may at any time be married, and in all other respects I confirm my said will and codicil."

The testator died on October 6, 1898, and his will and codicils were duly proved by John Vernon Cooper.

The house Bournewood, which was situate at Bournemouth, in the county of Hants, was held under a lease, dated December 7, 1891, granted by Sir George E. M. T. G. Meyrick, Baronet, to the Rev. W. Brandreth for a term of eighty years from June 24, 1891, at a yearly rent of 40*l.* The lease contained usual covenants by the lessee to pay the rent, to insure the premises against fire, and to keep them in repair. This lease was assigned to the testator by a deed dated October 30, 1897.

At the time of the testator's death all the covenants and conditions contained in the lease had been fully performed and observed on his part.

After the testator's death a question arose whether or not his widow, as tenant for life, was liable during her life or widowhood to pay the rent reserved by, and perform the covenants and conditions on the part of the lessee contained in, the lease of December 7, 1891, and this originating summons was taken

KEKEWICH J.

1899

GJERS, *In re.* COOPER *v.* GJERS.

out by John Vernon Cooper as plaintiff against the testator's widow Florence Longsdon Gjers and his son Lawrence Farrar Gjers for the purpose of having this question determined by the Court.

The case came on to be heard on April 14, 1899, and it was then mentioned to the Court that the same point was under the consideration of North J. in the case of *In re Betty* (1), and that his Lordship had reserved his judgment upon it. The hearing of this case was thereupon adjourned to await the decision in that case.

North J. delivered judgment in the case of *In re Betty* (1) on April 27, 1899. The effect of his decision was that he differed from the view taken by Kekewich J. in *In re Tomlinson* (2) of the meaning of the judgments of the Lords Justices in *In re Courtier* (3), and held that under a gift by a testator of a house and effects to trustees upon trust to permit a cestui que trust to have the personal use and enjoyment of the house and effects during her life the testator's estate, as against the equitable tenant for life, was liable only for repairs and expenses necessary to perform the covenants in respect of matters that occurred down to the time of his death; but that the tenant for life was liable for the expenses incident under the terms of the lease to the property during her life, such as payment of ground-rent, fire insurance premiums under covenants in the lease, and repairs for dilapidations during the tenancy for life.

A full note of the judgment of North J. having been furnished to Kekewich J. for perusal, this case was again placed in the paper and came on to be heard on May 13, 1899.

R. J. Parker, for the plaintiff.

George Lawrence, for the defendant, the widow, said that after the recent decision of North J. in *In re Betty* (1) he could not contend that there was anything in the judgments of the Lords Justices in *In re Courtier* (3) to prevent the Court from giving effect, in a case such as the present, to the general

(1) [1899] 1 Ch. 821. (2) [1898] 1 Ch. 232.
(3) (1886) 34 Ch. D. 136.

maxim "qui sentit commodum sentire debet et onus." But for the recent decision he should have relied on *In re Tomlinson* (1) as an express authority in his favour. [He referred also to *In re Redding* (2), *In re Baring* (3), *Kingham* v. *Kingham* (4), *Eccles* v. *Mills* (5), and *Hawkins* v. *Hawkins*. (6)]

Northcote, for the other defendant.

KEKEWICH J. The position of the question as regards the authorities is such that I do not think I ought to allow it to pass merely by saying that I dispose of the matter in the same way as it was disposed of by North J. in the case of *In re Betty*. (7) The question arose before me in the case of *In re Baring* (3), and is clearly stated in the head-note to that case. Shortly the case was this. There was a tenant for life of leasehold property, without any provision in the will for the tenant for life bearing the burdens and outgoings incident to the leasehold property, such as rent and repairs, the repairs being the most important point in the case, if I remember rightly. There I was pressed by exceptionally able counsel, Sir Horace Davey and Mr. Ingle Joyce, with the maxim which is quoted in the report, "qui sentit commodum sentire debet et onus." It went entirely on that. They did not think it necessary to quote any cases except *In re Fowler* (8) (a decision of Fry J., from which the Court of Appeal had departed, or which they had distinguished, in *In re Courtier* (9)) and *In re Courtier* (9); and it was argued on the other side by two sets of respondents on those cases, and Sir Horace Davey in reply went entirely on the decision in *In re Courtier*. (9) He went into that case again, but he never went into the general principle at all. He considered that that was sufficiently dealt with by quoting the maxim with which he commenced his argument. The view I took was that I was bound by *In re Courtier*. (9) I observe that in the Irish case of *Kingham* v. *Kingham* (4) the Vice-Chancellor of Ireland says that I arrived

(1) [1898] 1 Ch. 232.
(2) [1897] 1 Ch. 876.
(3) [1893] 1 Ch. 61.
(4) [1897] 1 I. R. 170, 174.
(5) [1898] A. C. 360, 369, 371, 372.
(6) (1880) 13 Ch. D. 470.
(7) [1899] 1 Ch. 821.
(8) (1881) 16 Ch. D. 723.
(9) 34 Ch. D. 136.

KEKEWICH J. 1899 GJERS, *In re*. COOPER *v.* GJERS.

at the decision with some reluctance, and he was right; I thought that the general maxim ought to be applicable, but thought myself bound by *In re Courtier* (1), the Court of Appeal having there decided that the tenant for life of the leaseholds was not liable for anything at all, but that the liability fell on the estate. Then the question came before Stirling J. in *In re Redding* (2), and he thought that I had misinterpreted the decision in *In re Courtier* (1), and that all that the Court of Appeal intended to decide was that the tenant for life of leaseholds was not bound to fulfil the covenants so far as they were broken at the testator's death. The property in *In re Courtier* (1) was not in a proper state of repair, and there were things that had to be done at the testator's death to make the lease good, and free from forfeiture. The Court of Appeal decided that an equitable tenant for life of leaseholds was not bound to put the property into such a state of repair as would satisfy the covenants broken by the testator. Stirling J. thought that the decision of the Court of Appeal did not extend to the liability or absolution from liability of the tenant for life after the testator's death onwards. When the point again came before me in *In re Tomlinson* (3), I read *In re Courtier* (1) with all the regard I could give to it, and I read, also with all respect, the judgment of Stirling J. and his comments on *In re Baring* (4), and I was unable to depart from my former view of what the Court of Appeal had decided. There the matter remained. *In re Baring* (4) had not been appealed from, and there was a difference between Stirling J. and myself. North J. has now delivered a considered judgment on the same point. He has first considered the law generally with reference to the rights of a tenant for life of leaseholds. Then he comes to *In re Courtier* (1), and says that *In re Courtier* (1) cannot be intended to introduce new law. That expression was a very favourite one with Sir George Jessel, who pointed out that the Court is bound to consider a decision even of the Court of Appeal with reference to the established law of the land. Then he proceeds to the case of *Eccles* v. *Mills* (5), and also to the

(1) 34 Ch. D. 136.
(2) [1897] 1 Ch. 876.
(3) [1898] 1 Ch. 232.
(4) [1893] 1 Ch. 61.
(5) [1898] A. C. 360, 371.

case, which is not binding on me but which is entitled to respect and attention, of *Kingham* v. *Kingham* (1), where the Vice-Chancellor of Ireland also thought that I had misconstrued *In re Courtier* (2), and said: "I am of opinion that a tenant for life, whether legal or equitable, is within the maxim, qui sentit commodum sentire debet et onus." So that we have all been on the same line, the only difference being that I have taken a different view of the decision in *In re Courtier* (2) from that taken by the other judges. Without admitting that the language of the Court of Appeal in *In re Courtier* (2) will not bear the interpretation which I have placed upon it, I am bound to admit, without the slightest hesitation, that it is capable of bearing another interpretation; and I do not hold myself entitled as a judge to say that my view of the decision in *In re Courtier* (2) is the right one, when I find Stirling J., North J., and the Vice-Chancellor of Ireland all thinking differently. I am content to give way, and I decide that the tenant for life must during her life or widowhood pay the rent and perform the covenants and conditions, including the covenant for insurance. In other words, I decide in conformity with the view of North J. in *In re Betty* (3) and of the Vice-Chancellor of Ireland in *Kingham* v. *Kingham*. (1)

Solicitors: *Hollams, Sons, Coward & Hawksley, for J. T. Belk & Cochrane, Middlesbrough.*

(1) [1897] 1 I. R. 170, 174. (2) 34 Ch. D. 136.
(3) [1899] 1 Ch. 821.

BYRNE J.

1899

Feb. 28;
March 1, 2, 3;
May 9.

SIXTH WEST KENT MUTUAL BUILDING SOCIETY *v.* HILLS.

[1897 S. 2534.]

Building Society—New Rules—Known Insolvency at Time of Passing—Ultra Vires—Transfer of Properties to Members in Exchange for Shares—Payment of Interest on Shares.

A rule conferring special powers of realization and of compromising and settling claims may be rightly passed by a building society after known and recognised insolvency, so long as the rule does not of necessity involve altering the constitutional rights of its members inter se or the rights of creditors, inasmuch as it may be exercised so as to be advantageous to all members alike.

If, however, such a rule is so exercised as to give unfair or undue advantage to individuals, this will be a breach of trust.

A building society under its rules issued three classes of shares—A, B, and C. Of these the C shares were preferential, the holders being entitled to be paid interest in lieu of bonus and other periodical payments. In October, 1889, the society passed a rule that after December 31, 1890, no further advances should be made upon shares then existing, and that from and after the passing of the rule the withdrawal of shares (other than C shares) by priority of notice should cease, and that the funds of the society should be applied, amongst other things, to the payment of capital and interest on the C shares.

On October 28, 1891, the society passed the following rule: "In order to facilitate the realization of any properties now or at any time in the possession of the society, the directors shall have power to sell the same or any part thereof to any member, and receive in payment, either wholly or in part, any fully paid or subscription shares held by the member, whether under notice of withdrawal or not, provided that such shares shall be taken subject to the deduction of any withdrawal fee in force for the time being."

At the time of passing the rule of October, 1889, and thenceforward, the society was known both to its officers and members to be insolvent in the sense that the assets of the society were not sufficient to repay in full the sums due to members on their shares, but there were no outside creditors.

The directors having acted in pursuance of the above rule of October, 1891:—

Held, in an action commenced against them as having acted ultra vires, that the rule of October, 1891, was not ultra vires, and that the directors were not liable for a breach of trust, and, further, that the payment of interest on the C shares was in accordance with the contract notwithstanding that the society was insolvent.

In December, 1878, the plaintiff society was duly registered under the Building Societies Act, 1874, as a terminating

society. In October, 1889, it was incorporated as a permanent society.

The society issued shares of three classes, known as A, B, and C shares respectively. The A and B shares were both subscription shares. Of these, the A shares were paid up gradually by instalments over a term of years, while for the B shares one sum was paid down at the beginning of a term of years, during which the share matured, and at the end of which it became payable. The C shares were issued only as fully paid.

The A and B shares stood in all respects (except as to the precise mode of payment by the subscribers) on the same footing. The C shares were a distinct class, and were issued under rule 22 of the society's rules, which was as follows: "The directors shall have power to issue preferential shares to be designated C shares in accordance with the following certificate:—

"'This is to certify that —— of —— is the proprietor of —— C shares of 100*l.* each in the funds of the society, bearing interest from this date (in lieu of bonus and other periodical profits) at the rate of 5*l.* per cent. per annum, payable half-yearly on the 1st day of January and the 1st day of July, which shares can either be withdrawn or paid off on receipt by the secretary to the society, or by the proprietor, as the case may be, of three calendar months' previous notice in writing, provided the said share or shares shall have been in existence twelve months, and, in the event of notice by the proprietor, will be paid out of the funds of the society along with the other 100*l.* C shares in order of priority of notice to withdraw the same.

"Dated this —— day of ——, 18—.'"

The object of the society was to raise a fund for advances to be made to members on the security of real or leasehold estates by way of mortgage.

By the original rules 102 and 103, all members were liable to contribute rateably to losses, and the right of withdrawal was regulated by rules 89 to 92 inclusive, which provided for the repayment of subscriptions, with interest, to unadvanced

BYRNE J.
1899
SIXTH WEST KENT MUTUAL BUILDING SOCIETY v. HILLS.

members giving notice of withdrawal, subject to certain deductions.

In October, 1889, resolutions were passed making the society permanent, and substituting for rules 89 to 92 inclusive the following rule: "After the 31st day of December, 1890, no further advances shall be made upon shares then existing. From and after the passing of this rule the withdrawal of shares (other than C shares) by priority of notice shall cease, and all funds derived from repayment of advances from realization of properties in possession, or any other source, shall be applied as follows: first, to the expenses of management and secretary's salary, the payment of capital and interest on C shares, and the remainder pro ratâ to the repayment from time to time of the subscriptions standing to the credit of the holders of unadvanced shares, until the total assets of the society shall have been realized and distributed."

These alterations were made at a time when the society had suffered severe losses, and was, in fact, insolvent. It was then contemplated that the society must realize and dissolve in one of the ways pointed out by s. 22 of the Building Societies Act, 1874.

It appeared from a minute of the directors' meeting of December 12, 1888, that the secretary had reported to the board that, after properly weighing the matter concerning the close of the society in two years, he had come to the conclusion that the best mode of ensuring reasonable and proper prices for the property in hand was to convert the society into a permanent one, thus obtaining the extension of time that might prove necessary for the accomplishment of this object.

No new members were admitted subsequently to the passing of the new rule in October, 1889, nor was any business transacted beyond protecting, getting in, and realizing the assets.

Prior to October, 1891, the society had taken possession of a number of properties in mortgage to it, and on October 28, 1891, at a meeting of the society, the following new rule was passed without a dissentient vote, and with but one expression of dissent, in a largely attended meeting:—

"In order to facilitate the realization of any properties now

or at any time in possession of the society, the directors shall have power to sell the same or any part thereof to any member, and receive in payment, either wholly or in part, any fully paid or subscription shares held by the member, whether under notice of withdrawal or not, provided that such shares shall be taken subject to the deduction of any withdrawal fee in force for the time being.

"The directors shall have power to dispose of any properties now or any time in possession to any depositor with the society, and to transfer until the usual notice of withdrawal any deposit standing in his name in payment or part payment of the same."

The directors, in pursuance of the last-mentioned rule, proceeded to transfer to the shareholders in the society properties belonging to the society in exchange for shares of the society held by them, the properties being transferred to the shareholders on the basis of the valuation in the society's books—the price being satisfied by the surrender of such a number of shares as made up in nominal value the amount of the purchase-money, any small difference between the two amounts being paid in cash. In one of such transactions, being one which was impeached, one of the defendants had bought from the society property which had been mortgaged to the society for 1500*l*. The purchase price for this property was brought into account with him against amounts standing to his debit as against the nominal amount of certain shares which he had purchased from other members of the society, and for which he paid 561*l*., and he paid in cash 31*l*. 3*s*. to balance his account. This property he subsequently sold for 925*l*. The result of the transaction being that, having paid in cash 592*l*. 3*s*., he made 332*l*. 17*s*., and gave up all right to share in distribution in respect of shares upon which there was nominally due to him more than 1600*l*.

No evidence was adduced to shew that the directors had favoured one shareholder more than another, or had treated a member more favourably on account of his being a director.

Subsequently to October, 1889, the C shareholders had been paid interest in lieu of profits.

BYRNE J.

1899

SIXTH WEST KENT MUTUAL BUILDING SOCIETY *v.* HILLS.

By an award of the Registrar of Building Societies, dated March 6, 1896, the society was ordered to be dissolved and its affairs to be wound up, and a liquidator was appointed for the purpose of winding up the same.

In 1894, upon a special case entitled *Sixth West Kent Mutual Building Society* v. *Shove* (1), heard by Stirling J. on June 19,

(1) Stirling J., June 19, 1895.

SIXTH WEST KENT MUTUAL BUILDING SOCIETY *v.* SHOVE.

[1894 S. 2438.]

THIS was a special case to obtain the opinion of the Court as to the rights of the holders of different classes of shares in the plaintiff society, and the questions submitted for the opinion of the Court were as follows :—

(1.) Are the C shares (referred to in the above report) preferential as regards capital, or only as regards payment of interest?

(2.) Is the rule of October, 1889 (set out in the sixth paragraph of the above report) ultra vires or otherwise invalid?

(3.) In what priority (if any) ought the plaintiff society to pay withdrawn shares?

Ashton Cross, for the plaintiff society.

Henry Terrell, for the A and B shareholders.

Duka, for the C shareholders.

[The following cases were referred to: *Hutton* v. *Scarborough Cliff Hotel Co. B.*, (1865) 2 Dr. & Sm. 521, since overruled by *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361; *Pepe* v. *City and Suburban Permanent Building Society*, [1893] 2 Ch. 311; *In re Sunderland 36th Universal Building Society*, (1890) 24 Q. B. D. 394; *Kemp* v. *Wright*, [1895] 1 Ch. 121; *Barnard* v. *Tomson*, [1894] 1 Ch. 374; *In re Reliance Permanent Benefit Building Society*, (1892) 61 L. J. (Ch.) 453.]

STIRLING J. I confess it seems to me that this case is governed by the case of *In re Sunderland 36th Universal Building Society*.

The society is formed under regulations which enable the directors to issue preferential shares. The nature of the preference to which they are entitled is ascertained from a certificate which the directors are authorized to issue. The certificate runs thus. [His Lordship read the certificate as set out in the third paragraph of the above report, and continued :—] Now, it seems to me that this certificate does create a priority or preference both as regards the right to interest payable, and also as regards the right of withdrawal. But there is not a word in the certificate to give to the holders of C shares any preference over the holders of other shares except as regards those matters, and I cannot see how C shareholders, who have not given any notice of withdrawal, are entitled to any priority over A and B shareholders in respect of other matters. In that state of things it is stated that about October, 1889, certain regulations were cancelled, and a new rule substituted. That rule runs thus. [His Lordship read the rule of October, 1889, as set out in the sixth paragraph of the above report.] That rule, it seems to me, must be read in the light of surrounding circumstances, and the surrounding circumstances are these. [His Lordship read paragraph 6 of the special case, which was to the effect that after October, 1889, no new

1895, the Court declared that the C shares in the society, in respect of which notice of withdrawal was not given before the change of rules in October, 1889, were preferential as

---

members had been admitted to the plaintiff society, and no business transacted other than that of protecting, getting in, and realizing the assets of the society; and, further, that in October, 1889, the society was unable, after payment of its debts, to meet the claims of withdrawing shareholders in full without having recourse to the powers contained in the old rules, and continued :—]

I think, therefore, that it must be taken that there was amongst the members of the society knowledge of a state of things which rendered a winding-up or a liquidation inevitable, and, in truth, the rule is directed to a realization of the assets and a distribution of them. Now, if the rule had taken no notice of the right of withdrawal, upon the authority of *In re Sunderland 36th Universal Building Society*, this result would follow, that the notices of withdrawal from that time must cease, and consequently all the members who had not given notice of withdrawal would be entitled to share in the assets pari passu.

Now, a rule might well have been passed regulating the rights of members who had given notice of withdrawal. Their rights would, according to the decision in *Walton* v. *Edge*, (1884) 10 App. Cas. 33, have been regulated by the date at which their notices to withdraw matured. The society has not taken this course, but, instead, it has passed the rule of October, 1889, which says that the withdrawal of shares—other than C shares—by priority of notice shall cease, and that the assets shall be applied in a certain way.

I fail to see how the society has any power to make such a rule as that. That appears to me to be sweeping away altogether the interests of the members under the contract which has been entered into. It seems to me to be a resolution in effect that the assets of the society being in the course of liquidation they are to be distributed otherwise than in accordance with the rights which existed under the old rules at the date when the resolution was passed, and in a different mode to that in which they would have been distributed if a winding-up order had been made. I cannot think that an alteration of rights of that character can be justified. I confine my judgment to this, that the winding-up of the company was really that which was in contemplation at the time when this rule was made, and it seems to me that this is an attempt on the part of the C shareholders, who constituted a majority of the society, to acquire for themselves a right to which they were not entitled.

I hold, therefore, that as regards C shares in respect of which no notice of withdrawal has been given, there is no preference in the distribution of the assets of the society.

The Court made the following declaration :—

"Declare as to question 1 that the C shares in the plaintiff society in respect of which notice of withdrawal was not given before the change of rules in October, 1889, are preferential as regards payment of interest only, and not as regards payment of capital, but that the holders of those C shares

BYRNE J. 1899 SIXTH WEST KENT MUTUAL BUILDING SOCIETY v. HILLS.

regards payment of interest only, and not as regards capital, but that the holders of C shares who gave notice to withdraw prior to October, 1889, were entitled to be preferred over the holders of shares who had not then given such notice, and that the rule of October, 1889, was invalid in so far as it varied any then subsisting rights of members.

The present action was brought against thirteen directors of the society, but in the result was prosecuted against four only, namely, Hills, Blackmur, Hudson, and Avery; and the plaintiff society claimed to have it declared that the execution by the defendants as directors of the society of conveyances of properties of the society in consideration of the surrender of shares therein was ultra vires, and that the defendants were liable to account for the value of such properties accordingly; and, further, that the defendants were liable to account to the plaintiff society for all sums of money paid out of the moneys of the society to C shareholders when there were no profits available for the payment thereof, and claimed consequential accounts and inquiries.

Neville, *Q.C.*, and *A. Sims*, for the plaintiff society. The rule of October, 1889, was in fact a winding-up rule, and after that date there was no right to make a preferential payment, and therefore the passing of the rule of 1891 was an attempt to confer a preferential right, and was accordingly ultra vires: *In re Sunderland 36th Universal Building Society*. (1) The question whether an investing member of a building society may withdraw so as to obtain priority over other members does not depend upon whether the society was solvent or insolvent when his notice matured, or whether the members or officers of the society then knew that the society was insolvent. The line is to be drawn at the time when there is a

who gave notice to withdraw before the change of rules in October, 1889, are entitled to be preferred over holders of shares who had not given notice; and as to question 2, that the new rule is invalid in so far as it varies any then subsisting rights of members."

Solicitors: *Lumley & Lumley*; *H. E. Bristow*.

G. M.

(1) 24 Q. B. D. 394.

stoppage of the society's business, or a recognition by those who are entitled to form a judgment that the business must be stopped: *In re Ambition Investment Building Society* (1); *Barnard* v. *Tomson*. (2)

[Upon the question whether or not the rule of 1891 was ultra vires, they referred to *Strohmenger* v. *Borough of Finsbury Permanent Investment Building Society* (3) and *Reg.* v. *Brabrook* (4), and further contended that the payment of interest on the C shares in lieu of profits was wholly improper, as there never were any profits.]

Farwell, Q.C., and *T. M. Stevens*, for the defendants Hills and Avery. The rule of October, 1891, is not of itself ultra vires. The idea of passing the rule was for the purpose of stopping withdrawals. It was in fact a winding-up rule conferring a power similar to that contained in articles of association enabling the liquidator to divide assets in specie after debts are satisfied. There was an inherent power in the society to alter the rules: *Pepe* v. *City and Suburban Permanent Building Society*. (5) If the directors can be shewn under the rule to have favoured one shareholder at the expense of others, then they have misused the power entrusted to them, and much more so if they have favoured a member of their own body; but, in the absence of evidence proving a breach of duty towards the general body of shareholders, they cannot be held liable. The object of passing the rule was to enable the society to have time to turn round; and we submit that the rule is not ultra vires, and that the action ought to be dismissed.

[They referred to *In re Ambition Investment Building Society* (1); *Barnard* v. *Tomson* (2); *In re Sunderland 36th Universal Building Society* (6); *Strohmenger* v. *Borough of Finsbury Permanent Investment Building Society* (3); *Brett* v. *Monarch Investment Building Society* (7); *Laing* v. *Reed* (8); *In re Kingston Cotton Mill Co.* (*No.* 2). (9)]

(1) [1896] 1 Ch. 89.
(2) [1894] 1 Ch. 374.
(3) [1897] 2 Ch. 469.
(4) (1893) 69 L. T. 718.
(5) [1893] 2 Ch. 311.
(6) 24 Q. B. D. 394.
(7) [1894] 1 Q. B. 367.
(8) (1869) L. R. 5 Ch. 4.
(9) [1896] 1 Ch. 331.

BYRNE J.
1899
SIXTH WEST KENT MUTUAL BUILDING SOCIETY v. HILLS.

Ashton Cross, for the defendants Blackmur and Hudson in the same interest.

Neville, Q.C., in reply. The rule cannot be enforced on a minority by a majority of three-fourths. The majority cannot say, "We will leave it to the directors to say how the assets are to be divided." In a society of this kind a preference cannot be given to one shareholder at the expense of others.

Cur. adv. vult.

May 9. BYRNE J., after stating the facts, proceeded:—The terms of the special case in *Sixth West Kent Mutual Building Society* v. *Shove* (1) agree with the conclusion I have come to on the evidence before me in regard to the surrounding circumstances and the object and intention of the alteration of the rules in October, 1889, and I have also read a note with which I have been furnished of the reasons of Stirling J. for his decision. The result is to establish the right of C shares to preference in respect of interest, to negative preference in respect of capital, and to determine, in accordance with the case of *In re Sunderland 36th Universal Building Society* (2), that the right of withdrawal by priority ceased in October, 1889, by reason of the known condition of insolvency of the society.

The main point which I have to consider is whether or not the rule of October, 1891, is invalid. In view of the decisions in *Strohmenger* v. *Borough of Finsbury Permanent Investment Building Society* (3) and *Pepe* v. *City and Suburban Permanent Building Society* (4), it is impossible to contend successfully that the right of a member of a building society like the present may not be varied by a new rule made under and in accordance with its statutory power of altering rules; and the rules may be varied so as to affect the rights of a member even after he has given notice of withdrawal. But, as was pointed out by Chitty L.J. in *Strohmenger* v. *Borough of Finsbury Permanent Investment Building Society* (3), a rule must not change the

(1) See ante, p. 64, n.
(2) 24 Q. B. D. 394.
(3) [1897] 2 Ch. 469.
(4) [1893] 2 Ch. 311.

constitution of the society, and the power of making and altering rules must be confined to the internal rights of the members of the society. In the same case it was also pointed out that there are obvious limits, which the learned judge did not attempt to define, to the powers of making and altering rules which have to be considered as the cases arise. Those were decisions in respect of the right of making rules where no question of known insolvency at the time of making the rules had arisen.

I think that the case of *In re Sunderland 36th Universal Building Society* (1) only extends what had been held in *Brownlie* v. *Russell* (2) as to the effect of a winding-up order to a period anterior to the date of the actual order.

In the case of *In re Ambition Investment Building Society* (3), upon a review of the prior authorities, it was held that a right of withdrawal under the rules came to an end when the society or its officers recognised that it must come to an end.

In *Barnard* v. *Tomson* (4) North J. held that there were no materials for drawing a line earlier than the date of the instrument of dissolution.

But, in the present case, it appears that at the date of the alteration of the rules in 1889 and thenceforward, and at the date of the alteration in 1891, it was known to the officers and members of the society that it was insolvent, and that liquidation was inevitable.

It appears to me that as from the earlier date I have mentioned such of the existing rules as, on the true construction of all the rules of the society, were intended to operate so long only as the continuance of the society was contemplated, ceased to have operation; and I consider that it follows by parity of reasoning that no rule could be passed altering the rights of the members of the society so as necessarily to affect their rights inter se in respect of liability, or in respect of distribution of assets, to the injury of some of such members, for the benefit or advantage of others, even although it might

(1) 24 Q. B. D. 394.
(2) (1883) 8 App. Cas. 235.
(3) [1896] 1 Ch. 89.
(4) [1894] 1 Ch. 374.

BYRNE J. 1899 SIXTH WEST KENT MUTUAL BUILDING SOCIETY v. HILLS.

be a rule properly made by a society not in contemplation of liquidation. I think, moreover, that in like manner it was incompetent to pass a rule conferring a power upon the directors which, if exercised, must necessarily have a similar operation. On the other hand, I see no reason for holding that the right to alter rules was gone altogether, and I think that it was competent to make rules for facilitating the realization of the assets of the society so long as such rules were bonâ fide passed for that purpose, and did not necessarily affect the rights of members in the way I have mentioned.

I ought to say that no question arises in the present case as to the possibility of affecting the rights of outside creditors.

A rule passed with the object and intention of facilitating realization, of avoiding the expense of a sale by auction, and of enabling the society to get rid of burdensome obligations, appears to me to be exactly the kind of rule which may be legitimately passed by a building society which is known to be insolvent as auxiliary to existing rules.

In my judgment, a rule of this description is not per se invalid, although the exercise of the power conferred may in individual instances be improper.

I think that a rule conferring special powers of realization and of compromising and settling claims may be rightly passed after known and recognised insolvency so long as the rule does not of necessity involve altering the constitutional rights of members inter se, or the rights of creditors, inasmuch as it may be exercised so as to be advantageous to all members alike; it is, however, obvious that, if such a rule is so exercised as to give unfair or undue advantage to individuals, such exercise will constitute a breach of trust.

It appears to me that the rule of October, 1891, complained of in the present action, was such a rule as I have last referred to, and not per se invalid, inasmuch as it might be exercised so as to be advantageous to all members alike.

I will assume as an illustration that an unadvanced member, who under ordinary circumstances would be entitled to withdraw, and who would on withdrawal have been entitled to

1000*l.*, has, by reason of the stoppage of the society's business, become entitled only in distribution of assets to his share pari passu with others (say, for example, a probable 500*l.*). The society is in possession of a property standing in their books as worth 1000*l.*, but in fact very much depreciated in value. The amount advanced on it is irrecoverable. It is only saleable to a member of the public by auction for 500*l.*, if saleable at all. If the society can sell to an unadvanced member for the 1000*l.* which stands in the books as the amount of his shares, they are no longer liable to pay him 500*l.* in the distribution; they have secured a purchaser, and have saved the expense of an auction—possibly the expense of an abortive auction—and have arrived a stage nearer to final distribution of assets. The purchasing member has perhaps made a good purchase, as he has got property which at one time was valued at 1000*l.*, though no longer marketable at that price, but which may perhaps recover in value in course of time, in exchange for something equivalent to a right to payment of 500*l.*; but the society has gained also in the respect I have mentioned. I think each transaction must stand or fall on its own merits. If the directors can be shewn under the rule to have favoured one shareholder at the expense of others, they have misused the power entrusted to them, and a fortiori if they have favoured a member of their own body; but in the absence of evidence proving a breach of duty towards the general body of shareholders, they cannot be made liable.

The rule impeached being in my judgment valid, the plaintiff society fails in the action so far as relief is sought against the defendant directors upon the footing of such rule being ultra vires.

[His Lordship having dealt with the part taken by the several directors above named in the various sales to the members of the society, and not calling for a report, proceeded:—]

The only remaining point is in reference to payment of interest on the C shares; but I think that such payment was in accordance with the contract with members holding C shares, and that the payments were not made in any way to the detriment of other members.

BYRNE J.

1899

SIXTH WEST KENT MUTUAL BUILDING SOCIETY v. HILLS.

The whole result of my judgment is that the plaintiff society has failed, and that the defendants against whom relief is asked are entitled to be paid their costs by the liquidator.

Solicitors: *Lumley & Lumley; Avery & Wolverson; Howard & Shelton; Essex, Bristow & Co.*

G. M.

JOHNSTON *v.* BOYES.

[1898 J. 853.]

COZENS-HARDY J.

1899

April 25, 28.

Vendor and Purchaser—Sale of Land by Auction—Refusal to accept highest Bidder—Cheque for Deposit—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

Defendants advertised a freehold public-house for sale by auction, under conditions providing that the highest bidder should be the purchaser, and that he should immediately after the sale pay to the auctioneer a deposit of 10 per cent. on the amount and in part payment of his purchase-money, and sign an agreement in the form annexed to the conditions, the form stating that the deposit had been paid. The plaintiff, a married woman with means at least sufficient to pay for the property, despatched her husband to bid for it. She did not, however, entrust him with the cash necessary to pay the deposit. The property was knocked down to him at 4900*l.* He had a banking account of his own (which, however, was not in credit to the amount of 490*l.*) and tendered his cheque for 490*l.*, the amount of the deposit. One of the vendors, however, recognised him as one who had recently openly sworn that he had nothing in the world except the clothes he stood up in, and on that vendor's instructions the cheque was refused; the husband was not allowed to sign the contract, although he protested that his wife "would find the money to-morrow" and that he was buying for her, and the property was sold to some one else at an enhanced price. The plaintiff thereupon sued the vendors for damages for breach of contract that the highest bidder should be the purchaser, and for refusing to allow the auctioneer to accept the cheque for the deposit, or to allow her husband to sign the contract. The Court found that if the cheque had been accepted the plaintiff would have provided funds to meet it.

Held, that a vendor who offered property for sale by auction, on the terms of printed conditions, could be made liable in damages to a person who accepted the offer and complied with the conditions if those conditions were violated by the vendor, and that the Statute of Frauds would be no defence: see *Warlow* v. *Harrison*, (1858) 1 E. & E. 295, 317; *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256:

But *held*, that no custom had been proved obliging a vendor to accept, in payment of a deposit, the cheque even of a person in credit, although such a course was usual; and that no such custom could bind a vendor to accept a cheque from a pauper; that the conditions meant that the deposit was to be paid in cash, and the vendors were not bound to wait till the next day for it or to sign the contract until this condition precedent had been performed.

THE defendants were trustees for sale of a freehold public-house called the White Hart, at South Mimms, and by advertisement and otherwise they gave notice that it would be offered for

COZENS-HARDY J.

1899

JOHNSTON v. BOYES.

sale by public auction on May 24, 1898. The conditions of sale under which the property was sold provided that the highest bidder should be the purchaser, and that he should immediately after the sale pay to the auctioneer a deposit of 10 per cent. on the amount and in part payment of his purchase-money, and should sign an agreement to complete the purchase according to the conditions in a form subjoined, which form stated that the deposit had been paid. The plaintiff, Mrs. Johnston, a married woman having separate estate, instructed her husband to attend the sale and to bid for the property as her agent. He bid 4900*l.*, at which price the property was knocked down to him as the highest bidder, and he then went up to the auctioneer's rostrum in order to sign the contract and to pay the deposit of 490*l.* at the rate of 10 per cent. on the purchase-money required by the conditions of sale. Boyes, one of the defendants, was standing near the auctioneer, and he recognised Johnston as a person who had shortly before been a party to certain proceedings at Barnet County Court, of which Boyes was registrar. At these proceedings Johnston had sworn that he had nothing in the world but the clothes he stood up in, and was entirely dependent upon his wife. Johnston tendered his own cheque in payment of the deposit, which the auctioneer, upon the vendors' instructions, refused to accept, nor was Johnston allowed to sign any agreement. The property was at once put up for resale, and realized 4950*l.*—an advance of 50*l.* upon Johnston's bid. It was proved at the trial of the action that Mrs. Johnston was a lady of means, and that it was her intention to put her husband's banking account in funds, and that the cheque would have been met. The plaintiff issued the writ in this action on May 27, 1898, claiming damages against the defendants for breach of an alleged contract that the highest bidder at the auction sale of the White Hart should be the purchaser thereof, and for refusing to allow the auctioneer to accept her husband's cheque in payment of the deposit, or to allow him to sign the usual agreement for sale on her behalf.

Tindal Atkinson, Q.C., and *F. P. Onslow*, for the plaintiff. The action is not brought for specific performance, and there-

fore no question as to the Statute of Frauds is involved. The plaintiff says she has lost by the wrongful refusal of the defendants to allow her husband to sign a contract to purchase the property and to pay the required deposit in accordance with the conditions of sale, and for this loss she claims damages. Where a person publicly offers to do something if any one comes forward and complies with certain conditions, there is a binding contract with the person who complies with the conditions: *Carlill* v. *Carbolic Smoke Ball Co.* (1)

[COZENS-HARDY J. Could the defendants, as trustees for sale, accept payment of the deposit by cheque?]

Certainly. If the cheque was dishonoured, they could put an end to the contract. It is the universal practice to accept cheques at auctions in payment of deposits. People attending auctions do not know what the property will be knocked down for, and therefore cannot tell what the amount of the deposit will be. They cannot be expected to carry large sums in gold about them in case their cheques are refused.

[COZENS-HARDY J. Is a tender by cheque sufficient? See *Blumberg* v. *Life Interests and Reversionary Securities Corporation.* (2)]

It has been held to be a reasonable custom for auctioneers to accept cheques in lieu of cash for deposits: *Farrer* v. *Lacy, Hartland & Co.* (3)

If the objection had been to the cheque as a cheque, it would not have been a good tender; but we say the receipt of the deposit was refused in order that the vendors might accept a better offer for the property.

Where chattels are advertised for sale by auction on printed conditions the vendor is liable, if he breaks the conditions, at the suit of a member of the public who accepts the offer and complies with the conditions, and in such a case "the Statute of Frauds, which relates only to direct sales and not to contracts relating to or connected with them," does not affect the case: *Warlow* v. *Harrison.* (4)

(1) [1893] 1 Q. B. 256.
(2) [1897] 1 Ch. 171; [1898] 1 Ch. 27.
(3) (1883) 25 Ch. D. 636; (1885) 31 Ch. D. 42.
(4) 1 E. & E. 295, 317.

COZENS-HARDY J.

1899

JOHNSTON v. BOYES.

[They also referred to *Spencer* v. *Harding*. (1)]

Eve, Q.C., *A. R. Ingpen*, and *F. A. Milne*, for the defendants. A cheque is not a legal tender as a rule: *Blumberg* v. *Life Interests and Reversionary Securities Corporation*. (2) It is certainly not a good tender when cash is demanded, as it was in this case. *Farrer* v. *Lacy, Hartland & Co.* (3) does not decide that there is such a custom as obliges a vendor or the auctioneer to take a cheque for the deposit from a solvent person—much less a person known to be impecunious. There is, on the other hand, no authority for an auctioneer or other agent employed to receive money to take anything but cash, unless it is in accordance with the usual course of business to take a cheque: *Papè* v. *Westacott*. (4) It is not the usual course of business to take cheques from persons who are notoriously impecunious; and if the auctioneer or Boyes had, with the knowledge they possessed, taken Johnston's cheque, and any loss had occurred, he would have been personally liable for any loss.

The vendors were not bound to wait to see whether the cheque was honoured. If they had done so and it had been dishonoured, the expense of a fresh sale would have been occasioned, and a smaller price might have been obtained than the one which was got by at once going on with the sale. In *Warlow* v. *Harrison* (5) what was offered for sale was a horse. This is an attempt to establish a verbal contract for the sale of land, and give the go-by to s. 4 of the Statute of Frauds.

Tindal Atkinson, Q.C., in reply. In *Warlow* v. *Harrison* (5) s. 17 of the Statute of Frauds was set up as a defence; but s. 4 in like manner only relates to direct sales of land, and not to contracts relating to or connected with them.

Cur. adv. vult.

April 28. COZENS-HARDY J. This is a very unusual action. The plaintiff, who is a married woman, claims damages under the following circumstances: The defendants, who are trustees for sale, offered the White Hart Inn for sale by auction

(1) (1870) L. R. 5 C. P. 561.
(2) [1897] 1 Ch. 171; [1898] 1 Ch. 27.
(3) 25 Ch. D. 636; 31 Ch. D. 42.
(4) [1894] 1 Q. B. 272.
(5) 1 E. & E. 295, 317.

on May 24, 1898. By the first condition of sale the highest bidder was to be the purchaser, and by the second condition the purchaser was immediately after the sale to pay to the auctioneer a deposit of 10 per cent. on the amount and in part payment of his purchase-money, and sign an agreement to complete the purchase. The form of agreement to be signed states that the deposit has been paid. Mr. Johnston attended the auction, and on behalf of his wife, the plaintiff, bid for the property, which was knocked down to him as the highest bidder at the price of 4900*l.* The plaintiff complains that by the defendants' direction Mr. Johnston was not allowed to sign the contract, and the property was sold to some one else for 4950*l.*, and the plaintiff claims damages on this footing. In point of law I think such an action can be maintained. A vendor who offers property for sale by auction on the terms of printed conditions can be made liable to a member of the public who accepts the offer if those conditions be violated: see *Warlow* v. *Harrison* (1) and the recent case of *Carlill* v. *Carbolic Smoke Ball Co.* (2) Nor do I think that the Statute of Frauds would afford any defence to such an action. The plaintiff is not suing on a contract to purchase land: she is suing simply because her agent, in breach of the first and second conditions of sale, was not allowed to sign a contract which would have resulted in her becoming the purchaser of the land. I think this conclusion results from the decision of the Exchequer Chamber in *Warlow* v. *Harrison*. (1) That was not a case under s. 4 of the Statute of Frauds, but the observations of Martin B. (3) as to s. 17 seem to me to be applicable to the present case. It is, therefore, necessary to consider whether the facts proved have established a breach of the contract alleged by the plaintiff. When the property had been knocked down to Mr. Johnston he went to the auctioneer's rostrum with a view to signing the contract. But Mr. Boyes, who is one of the defendants, and was the solicitor conducting the sale, recognised him as a man who in the previous week had appeared in the county court, of which Mr. Boyes is the

(1) 1 E. & E. 295. (2) [1893] 1 Q. B. 256.
(3) 1 E. & E. 317.

COZENS-HARDY J.

1899

JOHNSTON v. BOYES.

registrar, and sworn that he had nothing in the world but the clothes he stood up in. Mr. Boyes thereupon told the auctioneer not to take his cheque, and threatened that if he did he would be held liable for the consequences. Some further discussion took place, partly in the auction-room and partly in the ante-room, to which the auctioneer and his clerk and Mr. Johnston and the defendants retired, the result of which was that the refusal to accept the cheque was persisted in. Although Mr. Johnston said that "The missis would find the money to-morrow," Mr. Boyes said he must have the cash to-day, and, as Mr. Johnston did not provide the cash, the matter was treated as at an end so far as he was concerned, and a contract was immediately afterwards signed for sale to another gentleman at the increased price. Mr. Johnston swears that several publicans stated in the presence and hearing of Mr. Boyes that they would cash his cheque, and he also denies that there was any conversation in the ante-room. I am unable to believe his evidence, and believe the evidence of Mr. Boyes and of the auctioneer. I think, however, that Mr. Johnston did state, before the transaction was put an end to, that he was buying, not on his own account, but on behalf of his wife, and I think that if the cheque had been accepted, although Mr. Johnston had at the time no assets to meet it, the plaintiff would by her own cheque have provided funds for the purpose.

These being the facts which I find, do they entitle the plaintiff to relief? In my judgment they do not. I think the defendants were not bound to accept the cheque of Mr. Johnston, who was, and was known by them to be, a pauper. I do not think any custom has been proved to oblige vendors to receive the cheque even of a person in good credit, though it is, doubtless, usual to do so. And certainly no such custom could bind vendors to accept a cheque from a pauper. In my view it makes no difference that they were told that Mr. Johnston was buying for his wife. They were not bound to wait for cash until the next day. The second condition provided that the purchaser should "immediately after the sale" pay a deposit of 10 per cent. This means a payment in cash. No

such payment was made, and the defendants were under no obligation to sign the contract unless and until this condition precedent had been fulfilled. The result is that I think the plaintiff's action fails, and the action must be dismissed with costs in the usual form, having regard to the fact that the plaintiff is a married woman.

Solicitor for plaintiff: *Theodore Allingham.*
Solicitors for defendants: *Sismey & Sismey.*

F. E.

C. A. 1899 May 11, 13, 15.

BARING-GOULD *v.* SHARPINGTON COMBINED PICK AND SHOVEL SYNDICATE.

[1897 B. 4932.]
[1898 B. 1873.]

Company—Voluntary Winding-up—Reconstruction—Sale of Assets—Dissentient Member—Purchase of Interest—"Agreement"—Arbitration—Time for making Award—Umpire—Jurisdiction—Arbitrators "Called on to Act"—Notice to appoint Umpire—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *ss.* 16, 161, 162—*Arbitration Act*, 1889 (52 & 53 *Vict.* c. 49), *Sched. I.* (*c*).

The articles of association of a company provided that, "If at any time a sale or arrangement shall be made or proposed in pursuance of s. 161 of the Companies Act, 1862, the purchase-money to be paid for the interest of any dissentient member shall be such sum of money as the liquidator can obtain by selling the shares, stock, or other property to which such dissentient member would have been entitled upon the completion of the sale or arrangement had he not expressed his dissent."

The company resolved upon a voluntary winding-up, and authorized the liquidator to enter into an arrangement for the sale of the business and assets of the company to a new company:—

Held, that the above clause of the articles did not amount to an "agreement" within the meaning of s. 162 of the Companies Act, 1862, so as to deprive a member of the company who dissented from the arrangements of his right under that section to have the value of his interest in the company determined by arbitration.

Decision of Stirling J. affirmed.

Semble, that the "agreement" intended by s. 162 is an agreement between the dissentient member and the liquidator in the winding-up of the company.

When a notice is served upon arbitrators by one of the parties to the arbitration to appoint an umpire, they are "called upon to act" in the matter of the arbitration within the meaning of clause (*c*) of Sched. I. to the Arbitration Act, 1889, and the three months within which the arbitrators are by that clause bound to make their award run from the service of that notice upon them.

Decision of Stirling J., [1898] 2 Ch. 633, reversed.

APPEAL against a decision of Stirling J. (1)

The defendant company was incorporated under the Companies Acts on July 15, 1896.

(1) [1898] 2 Ch. 633.

By clause 128 of the articles of association, "If at any time a sale or arrangement shall be made or proposed in pursuance of s. 161 of the Companies Act, 1862, the purchase-money to be paid for the interest of any dissentient member shall be such sum of money as the liquidator can obtain by selling the shares, stock, or other property to which such dissentient member would have been entitled upon the completion of the sale or arrangement had he not expressed his dissent."

In 1897 a scheme was proposed for the reconstruction of the company, and at extraordinary general meetings of the company, held respectively on August 20 and September 6, 1897, a special resolution was passed and confirmed for the voluntary winding-up of the company and the appointment of a liquidator, who was thereby authorized to consent to the registration of a new company, and, pursuant to s. 161 of the Companies Act, 1862, to enter into an agreement with the new company (when incorporated), in the terms of a draft agreement approved by the resolution, for the sale of the business and assets of the old company to the new company, which was to pay, satisfy, and discharge all the debts, liabilities, and obligations of the old company, and to adopt, perform, and fulfil all their contracts and engagements.

On September 9, 1897, the plaintiff, who held 300 fully paid shares in the old company, gave notice in writing to the liquidator that he dissented from the special resolution, and that he required the liquidator either to abstain from carrying the resolution into effect, or to purchase the interest in the company held by him at a price to be determined in accordance with s. 162 of the Companies Act, 1862.

On October 9, 1897, the new company was registered, and on October 15, 1897, an agreement was entered into between the liquidator and the new company in accordance with the draft agreement approved by the special resolution.

On November 13, 1897, the plaintiff issued the writ in the above action, claiming to restrain the old company and the liquidator from carrying into effect the special resolution, so far as it related to the agreement, and from carrying into effect the agreement of October 15, and from parting with the under-

C. A. 1899 — BARING-GOULD v. SHARPINGTON COMBINED PICK AND SHOVEL SYNDICATE.

taking and assets of the old company to the new company, unless and until the defendants should have purchased the plaintiff's interest in the old company as provided by s. 161 of the Companies Act, 1862.

On December 3, 1897, the plaintiff moved for an injunction, but, upon his undertaking on or before December 10 to appoint a proper person to act as arbitrator on his behalf in fixing the price to be paid for purchasing the plaintiff's interest as a dissentient member of the defendant company, and the liquidator undertaking until judgment in the action or further order not to part with the assets of the defendant company without setting apart a sufficient sum to answer what might be found to be due to the plaintiff, no order was made upon the motion, except that the costs should be costs in the action.

On December 10, 1897, the plaintiff appointed an arbitrator, and gave notice to the liquidator of the appointment.

On December 23, 1897, the liquidator appointed an arbitrator on behalf of the company and himself, but notice of the appointment was not given to the plaintiff until January 11, 1898. The notice stated that the "appointment and all proceedings in such arbitration is and are to be as regards the said syndicate and myself under protest."

On the same January 11, the liquidator served on the plaintiff's arbitrator a notice in writing, dated December 24, 1897, and addressed to both the arbitrators, requiring them to appoint an umpire. It did not appear when this notice was served upon the other arbitrator, but on February 15, 1898, the arbitrators appointed an umpire.

The arbitrators did not make any award, but on April 30, 1898, the umpire made his award. It contained a recital that "the said arbitrators have not hitherto made any award of and concerning the premises." And by it the umpire awarded that the defendant company should pay to the plaintiff 100*l.* as the price to be paid for the purchase of his interest in the company, and that the company should pay to the plaintiff the costs of the reference and award.

On May 4, 1898, the plaintiff took out a summons for leave to enforce the award. The hearing of the summons was

adjourned into Court on the terms that the respondents should be at liberty to raise the question of the validity of the award.

On the hearing by Stirling J. the learned judge held that clause 128 of the articles did not constitute an agreement between the company and the dissentient shareholder within the meaning of s. 162 of the Companies Act, 1862, so as to exclude the right to arbitration under that section. But the learned judge held that by the notice requiring the arbitrators to appoint an umpire they had not been "called on to act" within the meaning of Sched. I. (*c*) to the Arbitration Act, 1889, and that consequently the three months within which the arbitrators were required by that clause to make their award had not expired, and the jurisdiction of the umpire had not arisen and his award was invalid.

By the order made upon the summons it was declared that, "the Court being of opinion that the jurisdiction of the umpire had not arisen, and that the award is therefore invalid; and the applicant and respondents by their counsel consenting to treat the summons as an application also to refer back the award," it was ordered that the plaintiff should repay to the company the sum of 100*l.* in the award mentioned, and that the award should be remitted to the arbitrators and umpire, and that the time for making the award should be extended until December 1, 1898. And it was ordered that the respondents should pay to the plaintiff his costs of the action. It was further ordered that no proceedings should be taken to enforce the order until fourteen days after the order should have been passed and entered, but, in the event of the defendants giving notice of appeal from the order within that time, no proceedings were to be taken to enforce the order until after the appeal should have been disposed of.

The company and the liquidator (by leave of Stirling J.) gave notice of appeal from the order, except so far as it declared that the jurisdiction of the umpire had not arisen. The plaintiff gave a cross-notice that on the hearing of the appeal he would ask that the order might be varied by declaring that the jurisdiction of the umpire had arisen, and that the award was therefore valid.

C. A. 1899 — BARING-GOULD v. SHARPINGTON [COMBINED PICK AND SHOVEL SYNDICATE.

Mattinson, Q.C., and *Beddall*, for the appellants. Clause 128 of the articles determines the price to be paid to the dissentient member, it being "an agreement" between the company and him binding on the liquidator, within the meaning of s. 162 (1) of the Companies Act, 1862. By s. 16 of that Act the articles of association are made binding between the members of the company, and, therefore, between any member quâ member and the company, which represents the body of members. This view is consistent with the class of cases of which *Eley* v. *Positive Government Security Life Assurance Co.* (2) and *Browne* v. *La Trinidad* (3) are examples, in which it has been held that a provision in the articles that a particular person, whether a shareholder or not, shall be employed as an officer of the company does not amount to an agreement between him and the company that he shall be so employed, for there the provision related to the individual, not in his capacity of shareholder, but as a stranger to the company. *Mulkern* v. *Lord* (4) illustrates the distinction between dealings by a company with one of its members as a stranger and such dealings with him as a member. There it was held that a member of a building

(1) By s. 14 of the Companies Act, 1862, the articles of association are to be signed by the subscribers to the memorandum of association, "and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient."

Sect. 16 provides that the articles of association, "when registered, shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, ... to conform to all the regulations contained in such articles, subject to the provisions of this Act ...."

Sect. 161 provides that "any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up"; subject to this proviso—that if any member of the company being wound up, who has not voted in favour of the resolution, expresses his dissent in writing as there mentioned, he may require the liquidators either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined in manner thereinafter provided.

And by s. 162, "The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement, but if the parties dispute about the same, such dispute shall be settled by arbitration ...."

(2) (1876) 1 Ex. D. 88.

(3) (1887) 37 Ch. D. 1.

(4) (1879) 4 App. Cas. 182.

society was not bound by statute to go to arbitration in a transaction outside his membership. The articles of association constitute an offer to come in to the company on the terms of their provisions, and those provisions are binding against and in favour of those who do come in. It was held in *Isaacs' Case* (1) that when a director named as such in articles of association had acted he was bound to take, and the company were bound to supply, his qualification shares.

The agreement referred to in s. 162 may be made previously to the winding-up of the company, and a company can by its memorandum of association exclude the operation of s. 161: *Cotton* v. *Imperial and Foreign Agency and Investment Corporation*. (2) The decision of Stirling J. that the jurisdiction of the umpire never arose was right. An award cannot be sent back on a mere question of costs. The respondent has elected to act on the decision, and cannot now appeal from it.

[LINDLEY M.R. He could not have come here, but you have brought him.]

Buckley, Q.C., and *Gore-Browne*, for the plaintiff. Clause 128 of the articles is not such an agreement as is contemplated in s. 162 of the Companies Act. *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (2) is merely a decision that s. 161 is not obligatory. Sect. 16 of the Companies Act, 1862, means that members who do not execute the articles are to be bound thereby, but it does not make the articles a contract between the members and the company. Every member as a corporator has a right to say to the company, "You shall observe these regulations"; but as an individual he is not entitled to say to the company, "This is a contract with me which I can enforce." The co-corporators may alter the regulations, and as a corporator he is subject to the will of his co-corporators: *Eley* v. *Positive Government Security Life Assurance Co.* (3); *Browne* v. *La Trinidad* (4); *In re Wheal Buller Consols.* (5) In *Swabey* v. *Port Darwin Gold Mining Co.* (6) the articles provided the amount of remuneration which

(1) [1892] 2 Ch. 158.
(2) [1892] 3 Ch. 454.
(3) 1 Ex. D. 88.
(4) 37 Ch. D. 1.
(5) (1888) 38 Ch. D. 42.
(6) (1889) 1 Megone, 385.

C. A. 1899 BARING-GOULD v. SHARPINGTON COMBINED PICK AND SHOVEL SYNDICATE.

was to be payable to the directors, and it was held that the company could not by special resolution retrospectively alter the terms of their employment by diminishing the rate of remuneration. The effect of that decision is that, though the articles did not themselves constitute a contract, they were evidence of the terms upon which the directors were employed. *Isaacs' Case* (1), in which a director appointed under an article requiring him to take a qualification, was held to have agreed to take the qualification, proceeded upon the same principle, and is not inconsistent with the other cases.

The result is that there was no agreement within the meaning of s. 162, and the dissentient member's right to have the value of his interest determined by arbitration was not excluded. The liquidator could not appoint an arbitrator "under protest."

With regard to the jurisdiction of the umpire, it is submitted that the view of Stirling J. was wrong, and that the three months, within which, by clause (*c*) (2) in the first schedule to the Arbitration Act, 1889, the arbitrators were bound to make their award, expired on April 11. Consequently the jurisdiction of the umpire had arisen when he made his award on April 30, and the award was valid. By the notice to appoint an umpire the arbitrators were "called on to act" within the meaning of clause (*c*). The act of appointing an umpire was an act done by the arbitrators as such. *Baker* v. *Stephens* (3) to some extent supports this view, but there is no direct authority on the point.

(1) [1892] 2 Ch. 158.

(2) By Sched. I., "(*c*) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

"(*d*) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

"(*e*) The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award."

(3) (1867) L. R. 2 Q. B. 523.

Mattinson, Q.C., in reply. "Called on to act" must mean the time when the arbitrators actually entered upon the reference, or when they ought to have done so. The appointment of an umpire has to be made before the arbitrators "enter upon matters referred to them": s. 130 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the provisions of which Act with respect to arbitration are, by s. 162 of the Companies Act, 1862, incorporated with that Act. The appointment of an umpire precedes the taking of any step in the arbitration.

There was either an agreement between the company and the dissentient member by virtue of clause 128 of the articles, or an agreement is to be inferred from the company's issuing shares to him and his holding them. The ground upon which the plaintiff succeeded in *Swabey* v. *Port Darwin Gold Mining Co.* (1) was, not that the articles of association constituted a contract between himself and the company, but that he was employed by the company upon the terms mentioned in the articles. That principle applies to the present case. *Isaacs' Case* (2) came after *Browne* v. *La Trinidad* (3) and *Eley* v. *Positive Government Security Life Assurance Co.* (4) The meaning of those cases is that every clause in articles of association is not necessarily an agreement between the company and its members. This depends on the nature of the clause in question. Such a clause may amount to a contract between the company and its members. In those two cases it was held that there was no such agreement. Here the plaintiff became a shareholder upon the terms contained in the articles. As against him there is an estoppel. The company allowed him to become a shareholder on the terms contained in clause 128, and they altered their position by admitting him as a member. As a shareholder he is bound by the regulations contained in the articles, including clause 128. The agreement mentioned in s. 162 need not be entered into after the passing of the resolutions for a voluntary winding-up.

(1) 1 Megone, 385.
(2) [1892] 2 Ch. 158.
(3) 37 Ch. D. 1.
(4) 1 Ex. D. 88.

C. A. 1899 BARING-GOULD v. SHARPINGTON COMBINED PICK AND SHOVEL SYNDICATE.

LINDLEY M.R. This appeal raises two questions—one of very considerable importance, and the other of comparatively small importance; but they both require attention. [After stating the facts and referring to ss. 161 and 162 of the Companies Act, 1862, his Lordship continued:—]

The first and the important point is this: whether clause 128 of the articles of association of this company can be regarded as an "agreement" within the meaning of s. 162. The liquidator contends that the provisions of s. 161 relating to the buying out of the dissentient member at a price to be ascertained by arbitration is excluded, not by reason of any agreement come to between himself and that member, but by reason of clause 128.

Now, it appears to me, I confess, that, notwithstanding s. 16 of the Act, the "agreement," whatever it may be, which is referred to in s. 162, means something very different from this clause of the articles. It means, I think, a sum agreed upon between the liquidator of the one part and the dissentient member of the other. This, it seems to me, is tolerably obvious when you look at the language of s. 161; and to say that one of the articles of association, which is a regulation of the company, is such an agreement, would be, as it appears to me, to use the word "agreement" in a sense in which it is not used in s. 162; and I doubt whether you can find it so used in any section whatever of the Companies Acts. [His Lordship read clause 128, and continued:—]

It is said that that clause amounts to an agreement between the company of the one part, and the dissentient member of the other part; and an endeavour is made to establish that proposition by reference to s. 16 of the Companies Act, a section which has given rise to a great deal of difficulty. It must be taken in connection with s. 14, which says that the articles of association are "the regulations of the company." That is what they are, call them what you like. Then s. 16 says that when registered they "shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there

were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act." This latter expression is important, because, whether you call them agreements, or covenants, or anything else, the articles can be altered in the way provided by s. 50 of the Act, namely, by a special resolution, which, when duly passed and confirmed, binds dissentient members. As we all know, the true effect of s. 16 has been discussed in a great number of cases; and ever since *Eley* v. *Positive Government Security Life Assurance Co.* (1), which has been often followed, it has been held that s. 16 does not mean that the articles are to be treated as an agreement between the company on the one hand and the members on the other, and on which either can sue the other. That, I think, is clearly established. There are, no doubt, cases, such as *Isaacs' Case* (2), in which it has been held that the articles contain the terms upon which persons can become members or directors of the company, and that an agreement may be implied partly from the articles and partly from the conduct of the parties. The articles are agreements in a sense—there can be no doubt about that. I do not understand now, and I never have understood exactly, what the true effect of s. 16 is. But, having regard to the decisions, beginning with *Eley* v. *Positive Government Security Life Assurance Co.* (1), I think it is clear that the company cannot sue a member, and a member cannot sue the company, upon the articles as if they were an agreement between the company on the one side and the member on the other.

But treating the articles as an agreement between the members themselves, as distinguished from an agreement between the company of the one part and the members on the other, it may be said that the articles are an agreement. But, to my mind, that is plainly not the kind of agreement which is referred to in s. 162. That agreement, whatever it may be, must be an agreement between the company on the one side and the member on the other, the company being represented by the liquidator. I am inclined to think that the true

(1) 1 Ex. D. 88. (2) [1892] 2 Ch. 158.

C. A. 1899 BARING-GOULD v. SHARPINGTON COMBINED PICK AND SHOVEL SYNDICATE. Lindley M.R.

construction of the word "agreement" in s. 162 is an agreement between the liquidator and the dissentient shareholder. I do not say that an agreement between a dissentient shareholder, or a shareholder who is about to dissent knowing what the proposed scheme is, and the company, even before the winding-up, if his mind were addressed to the particular thing, is necessarily excluded. A special agreement might be made and executed with the liquidator in any form—that is possible. But to say that the agreement referred to in sect. 162, as one to which the mind of the dissentient member and the mind of the company represented by the liquidator is to be addressed, can be replaced en bloc by one of the articles of association, binding all the members, whether dissentient or not, would, as it seems to me, be an unwarrantable extension or interpretation of the word "agreement" in s. 162.

I come, therefore, to the conclusion that there was no agreement between the company on the one side and Mr. Baring-Gould on the other which could deprive him of his rights as a dissentient member under s. 162. Any contrary interpretation of that section would come to this, that the company could by the articles of association made beforehand—before there was any dispute with a dissentient member—bind all the members, and deprive them of the benefits conferred on them in the event of their becoming dissentient members under s. 162. I do not think this can be done by the articles of association. This is my view of the joint effect of ss. 16, 161, and 162.

Now we come to a very subordinate point. This dispute between Mr. Baring-Gould and the liquidator was, in fact, referred to arbitration, and the umpire made an award. The liquidator throughout protested and maintained that the matter was not one for arbitration at all, but, under circumstances to which I need not further allude, the matter was in fact referred to arbitration, and the umpire has found that 100*l.* is the proper sum to be paid to Mr. Baring-Gould, and has awarded costs to him. The litigation turns entirely upon the question of costs, and the appeal is for costs, and nothing else.

It is said that the award is bad because it was made too

soon—that the jurisdiction of the umpire had not arisen. That objection impressed Stirling J., and he held that the award was made too soon. [His Lordship then referred to the dates as above stated, read clause (*c*) of Sched. I. to the Arbitration Act, 1889, and continued:—]

The arbitrators have three months within which to make their award, and the umpire has another month after the expiration of those three months. Every one agrees, although the enactment does not expressly say so, that the time from which the three months are to be reckoned is the first of the two periods mentioned, and not the last. If it were the last, the proceedings might be very unreasonably postponed. Therefore, there being no pretence for saying that the arbitrators had entered upon the reference before January 11, the question is whether the three months ran from January 11 by reason of the arbitrators having been then "called on to act." Stirling J. has, as I understand him, construed "called on to act" as meaning "called on to enter on the reference"; that is, to proceed to hear the parties. Now the language of the enactment is changed. The three months are to run first "after entering on the reference"; and then, in the alternative, after "having been called on to act." I confess I cannot see any ground for cutting down that expression. If they are "called on to act" as arbitrators, it must mean that they are called on to do an act as arbitrators. It appears to me that these arbitrators were "called on to act" by the notice to appoint an umpire; and there was very good reason for making the period of three months run from that time. If the arbitrators do not "enter on the reference," and they are "called on to act," it is an intimation to them that they are called on to do the work. I cannot agree with Stirling J. that "called on to act" means "called upon to enter on the reference." Being called on to do anything as an arbitrator is being called on to act. That the appointing of an umpire is an act done by the arbitrators as arbitrators is obvious. To do that which they could only do in the character of arbitrators is, in my judgment, clearly within the words, and I think it is within the sense of the expression used in clause (*c*). If that is so, the

C. A. 1899 BARING-GOULD v. SHARPINGTON COMBINED PICK AND SHOVEL SYNDICATE. Lindley M.R.

award of the umpire was not premature, for three months from January 11 had run out, and the arbitrators had not made an award, and the period for the umpire to step in and make his award had arrived. He made his award within a month, and in my opinion it is valid.

The result, therefore, is that the appeal of the liquidator fails, and the cross-appeal succeeds. The liquidator has been in the wrong throughout, and the order of Stirling J. must be varied by striking out the words, "The Court being of opinion that the jurisdiction of the umpire had not arisen." We must also strike out the direction that Mr. Baring-Gould is to repay the 100*l.* awarded to him, and the remission of the matter to the arbitrators. The plaintiff will have liberty to enforce the award as to costs.

RIGBY L.J. I so entirely agree that I need not add anything.

COLLINS L.J. I also agree.

Solicitors: *Booth & Smee; S. S. Seal.*

W. L. C.

COOTE *v.* FORD.

[1898 C. 3093.]

C. A. 1899 STIRLING J. *April* 14, 21 C. A. *May* 19.

Practice—Action—Damages—Injunction—Defence—Denial of Liability—Payment into Court—Satisfaction—Admission of Plaintiff's Claim—Counter-claim—Striking out—Rules of Supreme Court, 1883, *Order* XXII., *rr.* 1, 6.

A landowner brought an action claiming damages for trespass, and also an injunction. The defendant put in a defence and counter-claim alleging a right by custom to go on the land, and, under Rules of the Supreme Court, 1883, Order XXII., r. 1, with his defence, though denying liability, paid a sum into court by way of satisfaction of his liability, if any, in respect of the matters complained of. Under rule 6 the plaintiff took the money out on notice to the defendant that he accepted it "in satisfaction of the claim in respect of which it is paid in."

On an application by the plaintiff to strike out the counter-claim on the ground that the defendant had by his payment into court, followed by the plaintiff's acceptance, admitted the plaintiff's entire cause of action :—

Held, by the Court of Appeal (affirming the decision of Stirling J.), that there had been no such admission by the defendant as to preclude him from prosecuting his counter-claim setting up the custom, nor (*semble*) such acceptance in satisfaction by the plaintiff as to preclude him from prosecuting his claim for an injunction, the payment into court being by rule 1 confined to the plaintiff's claim for damages only.

In this action the plaintiff, the lord of the manor of Martin, Wiltshire, alleged by his statement of claim (par. 2) that on September 1, 1898, the defendants, who were nine in number, wrongfully broke into and entered a piece of land of about 800 acres, forming part of the waste of the manor, in pursuit of game and rabbits, and then and there killed game and rabbits; and (par. 3) that the defendants wrongfully claimed to be entitled to enter upon the said piece of land and there to pursue and kill game and rabbits, and that they respectively still persisted in the said claim and threatened and intended to repeat the acts complained of. He then claimed (1.) damages for the wrong complained of, and (2.) an injunction restraining the defendants respectively from any repetition of such acts.

The defendants, of whom five were copyholders of the manor, two were tenants of copyholders, and the remaining

C. A. 1899 COOTE v. FORD.

two were servants of tenants of copyholders, by their defence admitted the plaintiff's title to the piece of land, subject to the rights of the copyholders and their tenants. In paragraph 2 they alleged that the copyholders of the manor, in right of their respective tenements, were by the custom of the manor entitled to the right and privilege, for themselves and their tenants in occupation of the said tenements, of killing and taking rabbits on and from the said land by themselves or their servants, and their tenants and the servants of such tenants; alternatively, that the tenants of copyhold tenements for the time being had the same right and privilege by virtue of their tenancy. In paragraph 3 they alleged that the copyholders and their tenants, and the respective predecessors in title of the copyholders in their respective tenements, had exercised and enjoyed the right and privilege aforesaid from time immemorial, and also for the respective periods of thirty and sixty years, without interruption before the commencement of this action. The defendants admitted that on the day named four of their number, being the two tenants of copyholders and the two servants of tenants, did, as such, enter upon the said land in pursuit of rabbits and killed there certain rabbits. Paragraph 7 was as follows: "Denying liability, each of the defendants brings into court the sum of 1*s.*, and says that the same is sufficient to satisfy his liability (if any) to the plaintiff in respect of the matters complained of." The two defendants, the tenants of copyholders, then put in a counter-claim, in which they repeated paragraphs 2 and 3 of the defence and alleged (par. 9) that the copyholders were, by the custom of the manor, entitled to common of pasture and common of estovers in and over the said lands; and they claimed (1.) a declaration that they had, in respect of their occupation of their copyhold tenements, the rights and privileges mentioned in paragraphs 2 and 9; and (2.) an injunction to restrain the plaintiff, his servants and agents, from interfering with or diminishing the enjoyment by the copyholders or by their tenants, or by them the counter-claiming defendants, of the right of killing and taking rabbits, or of the rights of common for pasturage and estovers aforesaid.

The sum of 9*s.* was paid into court pursuant to Rules of Supreme Court, 1883, Order XXII., r. 1 (1), and was taken out by the plaintiff, under rule 6, he giving the defendants due notice in writing, in Form No. 4 in Appendix B to the rules, that he "accepted the sum of 9*s.* paid by them into court in satisfaction of the claim in respect of which it is paid in." The plaintiff then applied in chambers to strike out the reference in the counter-claim to paragraphs 2 and 3 of the defence as tending to prejudice and embarrass the plaintiff by raising again upon the counter-claim matters already disposed of upon the claim. That application was refused, and the plaintiff moved before Stirling J. on April 14, 1899, to discharge that order.

Butcher, Q.C., and *A. àB. Terrell*, for the plaintiff. The payment into court operates as an admission of the plaintiff's entire cause of action; it is made in respect of all the matters complained of: Order XXII., r. 1. If the defendants are right

(1) Order XXII., r. 1, is as follows:—

"Where any action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability (except in actions or counter-claims for libel or slander), pay money into court which shall be subject to the provisions of rule 6 . . . ."

The material part of rule 6 is as follows:—

"When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence, the following rules shall apply:—

"(*a*) The plaintiff may accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him as hereinafter provided, notwithstanding the defendant's denial of liability, whereupon all further proceedings, in respect of such claim or cause of action, except as to costs, shall be stayed; or the plaintiff may refuse to accept the money in satisfaction and reply accordingly, in which case the money shall remain in court subject to the provisions hereinafter mentioned.

"(*b*) If the plaintiff accepts the money so paid in, he shall, after service of such notice in the Form No. 4 in Appendix B. as in rule 7 mentioned, or after delivery of a reply accepting the money, be entitled to have the money paid out to himself on request, or to his solicitor on the plaintiff's written authority, unless the Court or a judge shall otherwise order."

C. A. 1899 COOTE v. FORD.

in their contention, then, in a case of trespass of this kind, all that the defendant has to do is to pay into court, and put in a counter-claim, and he will then become the plaintiff, and the original plaintiff will be embarrassed, as the plaintiff is here, because he cannot proceed with his action of trespass. The payment into court cannot be treated as apart from the cause of action. The plaintiff, by taking out of court money which has been paid in by the defendant, constitutes the payment in as an admission of liability by the defendant.

[They referred to *Wheeler* v. *United Telephone Co.* (1)]

Duke, Q.C., and *D. M. Kerly*, for the defendants. Under the rules money can only be paid in in respect of a debt or damages. The payment-in in this case does not affect the claim for an injunction, and the plaintiff can still prosecute his action as to that. There is no such admission of the entire cause of action as is contended for by the plaintiff: *Steavenson* v. *Berwick Corporation* (2); *Kingham* v. *Robins* (3); *Hennell* v. *Davies*. (4) It is said that the plaintiff can, by taking out of court money paid in by the defendant in respect of damages only, treat the payment in as an admission of the plaintiff's entire cause of action, and that notwithstanding a denial of liability by the defendant. Such a contention is based on a mistaken apprehension of the effect of the rules: *Berdan* v. *Greenwood*. (5) If the plaintiff is embarrassed, such embarrassment is due to his own proceedings, and not to those of the defendants.

[STIRLING J. referred to *Emden* v. *Carte*. (6)]

Butcher, Q.C., in reply.

April 21. STIRLING J., after stating the facts, and observing that there were two causes of action disclosed by the statement of claim, (1.) an actual trespass, in respect of which damages might be recovered at law, and (2.) threats of a continued trespass in respect of which an injunction might be obtained, continued:—The practice of pleading a payment

(1) (1884) 13 Q. B. D. 597.
(2) (1841) 1 Q. B. 154.
(3) (1839) 5 M. & W. 94.
(4) [1893] 1 Q. B. 367.
(5) (1878) 3 Ex. D. 251.
(6) (1881) 19 Ch. D. 311.

into court with a denial of liability is of recent origin. It first arose under Order xxx. of the orders in the schedule to the Judicature Act, 1875. Those orders did not expressly permit a payment into court where there was a denial of liability; but the practice was established by the decision of the Court of Appeal in *Berdan* v. *Greenwood*. (1) The grounds on which it was allowed are to be found at pp. 257, 259 of the judgment delivered by Thesiger L.J. The Lord Justice says this (2): "Is there, then, anything inherently unjust in a defendant paying money into court in respect of a cause of action, which at the same time he by his pleadings denies to exist? As a general proposition we should answer nothing, while there is much to be said in favour of it. Is it just in principle as regards a defendant, who considers that he has a good defence on the merits, but who is desirous, if possible, of terminating litigation by a payment of money, that he should be forbidden to adopt this prudent course, except under the penalty of a complete admission of a cause of action which he honestly disputes, and with the consequent risk which would attend the trial of the action if the sole issue were as to the sufficiency of the amount paid in?" And the Lord Justice further says (3): "To the lawyer's mind there is, no doubt, at first sight something anomalous in payment by way of satisfaction or amends in respect of a cause of action, the existence of which the defendant by his pleading denies; but the more we have considered the point, the stronger has become our conviction that there is nothing unreasonable or unjust, and nothing contrary to the letter or spirit of the Judicature Acts or Orders, in a defendant so acting; and we think that, apart from anything in the Judicature Acts or Orders to compel us to do so, no predilection in favour of the old theories of consistent records should induce us to preclude defendants in actions from saying and doing that which, as practical men, before the action they might reasonably say and do, namely, say that they entirely deny a person's right to sue them, yet pay, or offer to pay, a sum of money as the price of peace and for the prevention of further litigation."

(1) 3 Ex. D. 251. (2) 3 Ex. D. 257. (3) 3 Ex. D. 259.

C. A. 1899 COOTE v. FORD Stirling J.

The subsequent orders of 1883 recognise the practice, and contain provisions with respect to it. It is admitted in the passage which I have read, and has subsequently been remarked, that there is a want of logical consistency in allowing a defendant to say in one and the same breath that the plaintiff has no claim and yet to offer a sum in satisfaction. In truth, the practice is a concession to practical convenience at the expense of logic; and under such circumstances difficulties may easily arise as to the effect of it. In endeavouring to solve such difficulties recourse must be had to the existing rules on the subject to be found in Order XXII. of 1883, which vary materially from those of 1875. Rule 1 shews that it only applies to actions to recover a debt or damages. If there is no denial of liability, the rule expressly provides that the payment into court "shall be taken to admit the claim or cause of action in respect of which the payment is made." Those words are not found in the Rules of 1875. In such a case under rule 5 the money in court may on his request be paid out to the plaintiff, unless the Court otherwise order. If the liability of the defendant is denied, then according to rule 1 the payment into court is subject to the provisions of rule 6: of which clause (*a*) is that which is material in the present case. It, also, is not to be found in the Rules of 1875. The rule says that the consequence of acceptance is that "all further proceedings in respect of such claim or cause of action" (i.e., the claim or cause of action in respect of which the payment into court has been made), "except as to costs, shall be stayed."

It is to be observed that this provision differs very materially from that of rule 1 as to the effect of a payment into court without denial of liability. Rule 1, as I have already pointed out, expressly provides that where the plaintiff accepts a sum of money paid in by way of satisfaction where there is no denial of liability the defendant shall be taken to admit the cause of action, whereas under rule 6 there is nothing said about any admission by the defendant; but it is provided that upon acceptance by the plaintiff all further proceedings in respect of the claim or cause of action are to be stayed except as regards costs. Under rule 7, if the entire claim or cause of action is

satisfied, the plaintiff may proceed to tax his costs, and in case of non-payment of the costs for forty-eight hours after taxation may sign judgment for the costs so taxed. It is therefore clear that the defendant by promptly paying the costs may prevent judgment against him appearing on the record. I think the adoption of the course pointed out in this part of the rules is not intended to lead to any adjudication by the Court, but on the contrary to prevent the necessity of any such adjudication. Under these circumstances I do not see how any such proceedings could ever be available as a ground for a plea of res judicata. If either party were to attempt to reopen the matter, the appropriate defence of the other would seem to be, not a plea of res judicata, but an application to the Court to stay proceedings either under this rule, the words of which may be wide enough to extend to proceedings, not in the action, or, if that be not the true construction of the rule, to apply for a stay on the ground that such proceedings would be an abuse of the process of the Court. I am not however to be understood as saying that such an objection could not be raised by means of the defence.

This being the general nature of the rules, how do they apply to the present case? The first point to be determined is in respect of what claim or cause of action the payment into Court was made. The language of the defence, "in respect of the matters complained of," is somewhat vague; but, remembering that the payment can only be made in respect of damages, it seems to me that the matters referred to are those stated in paragraph 2 of the statement of claim. I do not think, regard being had to the other allegations of the defence, that the payment in can be treated as intended to be a satisfaction of those alleged in paragraph 3, namely, the continued threats of trespass in respect of which the pleadings disclose the existence of a continuing cause of action. In support of that view I refer to *Moon* v. *Dickinson*. (1) It follows that the entire cause of action of the plaintiff is not satisfied, and there is nothing to prevent the plaintiff from proceeding to trial with his action as regards the matters alleged in paragraph 3

(1) (1890) 63 L. T. 371.

C. A. 1899 COOTE v. FORD. Stirling J.

of the statement of claim. This being so, is the plaintiff prejudiced or embarrassed? He alleges that he is, because he says the counter-claim raises afresh matter disposed of on the claim. This contention is based on the ground that, having accepted the money paid into court, the plaintiff is entitled to treat the payment as an admission by the counter-claiming defendants that the plaintiff has a good cause of action as regards the matters complained of in paragraph 2 of the statement of claim; and consequently it is said that the rights claimed by paragraphs 2 and 3 of the defence do not exist. I do not think that the plaintiff is entitled to treat the payment into court, although accepted by him, as an admission of his title. The rules do not provide that the defendant shall be deemed to have made any such admission; indeed, they appear to me studiously to avoid imposing any such obligation. The object of the rule is, in the language of Thesiger L.J., to enable a defendant to deny a person's right to sue, yet to offer a sum as the price of peace, and for the prevention of further litigation. This object would be defeated by a provision that acceptance of the offer should be deemed to be an admission of the right. All that can fairly be inferred is that, as regards the matters complained of in paragraph 2 of the statement of claim, both parties are willing that no further litigation should take place; but at the same time, on the pleadings as they stand and as I read them, the plaintiff insists on his right to relief in respect of the matters complained of in paragraph 3, while the defendants insist by way of defence on the right pleaded, and seek to establish that right by their counter-claim.

If, however, I am wrong in this, and the defendants are to be treated as having made some admission, I do not think it goes to the extent contended for by the plaintiff. It appears to me that all that ought to be inferred would be an admission, not that the right on which the defendants rely by way of justification is non-existent, but that notwithstanding its existence it for some reason fails to protect them on the particular occasion referred to in paragraph 2 of the claim. This may perfectly well be in many ways: for example, the right pleaded is only available for copyholders and their tenants, and the

servants of such. Five of the nine defendants are not shewn to be such persons: and presumably, therefore, they had no right to do what they are alleged to have done; but they may have been brought on to the lands by the other defendants, who may be answerable for their acts. Or again, some of the acts complained of may turn out to have been done on land which is not subject to the rights of the copyholders.

I do not think it necessary to discuss minutely the cases cited, because they were decided on the old Rules of 1875, which do not contain the provisions found in those of 1883, on which I have to decide.

The result of what has been done is, in my opinion, that the matters stated in paragraph 2 of the claim have been taken out of the litigation, and that between the parties peace with regard to them—again using the language of the Lord Justice—must prevail; but that this result has been attained in such a way that the plaintiff is not entitled to rely on it as an admission which affects that portion of the litigation which has not been put an end to, namely, the cause of action stated in paragraph 3 of the statement of claim, and the rights stated in paragraphs 2 and 3 of the defence, and repeated in the counter-claim. In my judgment, therefore, the motion fails, and must be refused.

I desire, however, to point out that my opinion turns on the construction which I have placed on paragraph 7 of the defence, and which I understand to be the construction intended to be placed on it by the defendants. It is, however, less precise than could be desired, and I think that it should be amended, or treated as amended, by expressly limiting its operation to the matters stated in paragraph 2 of the claim. If the plaintiff has been misled, I think he ought to have an opportunity of reconsidering his position and, if necessary, of making an application to be allowed to replace the money in court and to withdraw his notice. I do not desire, however, to encourage such an application. It seems to me that the course which has been taken, as I understand it, is a reasonable one; and I also desire that the position as regards the defendants, other than the two who raise the counter-claim asserting a right,

C. A. 1899 COOTE v. FORD.

should be considered, and that those defendants should be got rid of as speedily as possible, and the action tried between the two contending parties. I ought to add that the remarks I have last made ought not, in my opinion, to affect the result of the motion as regards the costs, which ought to be the defendants' in any event.

The order was drawn up in the following terms:—

"The Court being of opinion that the payment into court by the defendants of the sum of 9*s.* with their defence denying liability, and the acceptance thereof by the plaintiff in satisfaction of the claim in respect of which it was paid in, did not dispose of the whole cause of action": no order except that the defendants should be paid their costs of the motion in any event.

G. A. S.

The plaintiff appealed.

C. A. The appeal was heard on May 19, 1899.

Butcher, Q.C., and *A. àB. Terrell*, for the appellant, the plaintiff, contended, as in the Court below, that the effect of the payment into court by a defendant, and the acceptance of the money by the plaintiff, was and had always been treated as a satisfaction of the entire cause of action, and that in this respect the rules under the Judicature Act had made no alteration in the previous practice. The object of rules 1 and 6 of Order XXII. was to enable a defendant to buy peace; but he did not do so if he merely parted with a sum of money for which he got nothing at all. The intention of these rules was to allow the defendant to abandon his right on certain terms. Here, when the defendants paid the money into court with their defence, they meant to say that they denied the liability but rather than go on with the litigation they each paid 1*s.* into court, and so made an end of the matter. It was true that, under the latter part of rule 1, the payment-in was not in itself a satisfaction of the plaintiff's claim; but under rule 6 the plaintiff could, and in fact did, convert that payment into satisfaction. The satisfaction of the plaintiff's claim, and the consequent stoppage of further proceedings, was the very thing that tempted him to accept the payment-in. The defendants made a solemn offer, which the plaintiff accepted, and, when

accepted, it was analogous to an offer made without prejudice and accepted.

[Besides *Wheeler* v. *United Telephone Co.* (1) and *Berdan* v. *Greenwood* (2), cited in the Court below, they referred to *Perren* v. *Monmouthshire Railway and Canal Co.* (3), *Goutard* v. *Carr* (4), and *Wood* v. *Leetham.* (5)]

Duke, Q.C., and *D. M. Kerly*, for the respondents, the defendants, were not called upon.

LINDLEY M.R. stated the facts, and continued :—

The plaintiff now seeks to stop the defendants' counter-claim and prevent them from setting up the custom which they allege, on the ground that they must be treated as having estopped themselves by the admission they have made by paying the money into court, and by the plaintiff having accepted it and taken it out in satisfaction. But that does not appear to me to be the legal effect of what has been done.

The money is paid into court under the existing Rules of the Supreme Court, 1883, and the question turns on the true effect of Order XXII., rr. 1 and 6. Order XXII., r. 1, enables a defendant to pay money into court in one of two ways, either by way of satisfaction, thus admitting the plaintiff's claim in respect of which the money is paid in, or with a defence denying liability. The rule is confined to actions to recover a debt or damages : it has nothing to do with ordinary injunctions. I do not say it has nothing to do with this action, because this action is an action for damages as well as for an injunction ; and so far as it is an action for damages, it is quite within the defendants' rights to pay money into court. If a defendant pays money into court under the first part of the rule, that is, by way of satisfaction, he is to be taken to admit the claim or cause of action in respect of which the payment is made. That is not what the defendants have done here. They have paid the money in under the next part of the rule, that is, the defendant denying liability. In that case the

(1) 13 Q. B. D. 597.
(2) 3 Ex. D. 251.
(3) (1853) 11 C. B. 855, 865–6.
(4) 13 Q. B. D. 598, n.
(5) (1892) 61 L. J. (Q.B.) 215.

C. A. 1899 COOTE v. FORD. Lindley M.R.

rule does not say a word about the payment-in being in satisfaction which shall be taken to admit the claim or cause of action. The rule does not say that at all, and it is obvious why. It is utterly inconsistent to say that a man may deny liability, and yet by paying money into court admit it at the same time. That is altogether inconsistent. If a defendant, with a defence denying liability, pays money into court, then the payment is subject to rule 6. That rule says: "When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence, the following rules shall apply: (*a*) The plaintiff may accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him as hereinafter provided"—that refers to rule 7—"notwithstanding the defendant's denial of liability, whereupon all further proceedings, in respect of such claim or cause of action, except as to costs shall be stayed." What does that mean? Does that mean that the plaintiff can, by taking the money out of court, treat a denial of liability as an admission of the liability? Can he force the defendant to admit that which he has strenuously denied? That appears to me to be nonsense. The rule means what it says. It says in effect, "If you, the plaintiff, like to take the money out in satisfaction, all proceedings in the action, so far as it relates to the matter in respect of which the money has been paid in, are at an end—you are not to fight it out: if you like to take the money in satisfaction of all damages, then the action is stopped so far as regards these damages." One sees the sense of that from the plaintiff's point of view, and also from the defendant's point of view. The defendant says, "I am not going to admit your right; but it is not worth fighting, so far as the damages are concerned, and I shall pay one shilling into court, and get rid of it so far." But if the action claims an injunction as well as damages, the defendant cannot, by payment into court, get rid of it so far as the injunction is concerned. Whether the plaintiff can in this action, as Stirling J. thinks he can, go on with a view to an

injunction may be possibly a question. I should think he could, because you cannot properly pay into court by way of defence to an injunction. You can only treat a payment into court as in respect of that in which it can be properly paid in, the claim for damages.

Supposing the plaintiff cannot go on with his injunction—which is not my view and is not Stirling J.'s view—what right has he to ask us to strike out the counter-claim, and prevent the defendants from pleading in their counter-claim and setting up the custom on which they rely? So to do would enable the plaintiff to put the defendants into a position which they have carefully avoided being put into. That is to say, the plaintiff would be forcing upon the defendants an admission contrary to their protest, they altogether denying the plaintiff's right to interfere with the rights they claim. I think Stirling J.'s view is quite right, and the cases referred to do not appear to me to have really any bearing upon the present controversy.

So far as the working out of these rules is concerned, the view taken by Cotton L.J. in *Berdan* v. *Greenwood* (1) is right. If the plaintiff goes on with his action for an injunction, or if the defendants go on—if either party goes on—and the plaintiff succeeds in establishing his right, I cannot conceive why he should not get the costs of his action. Neither can I conceive why the defendants should not set up the custom of this manor. To say that the custom of this manor cannot be investigated, either now or hereafter, because the plaintiff has taken this money in satisfaction of the damages, is altogether wrong.

The appeal must be dismissed, with costs.

RIGBY L.J. I agree with all that the Master of the Rolls has said, and I shall add only a few observations of my own.

First of all, I say that Order XXII., r. 1, is confined to the case of an action brought to recover a debt or damages. It does not mean that, where an action is brought to establish a right, the consequences involved in rule 1 are that that right shall be established by the payment into court by the

(1) 3 Ex. D. 251.

C. A. 1899 COOTE v. FORD. Rigby L.J.

defendant of money accompanied by a denial of liability. It would be very strange if that were so. I have no doubt that the money paid in here with a denial of liability was in respect of the action so far as it is an action for damages. That being so, I see really no difficulty on the construction of the rules as they stand.

We were invited to consider several cases, but they are all distinguished from the present by the fact that, down to the latest time before issuing the rules, there was no such thing as payment into court (which is now rendered legal) along with a denial of liability. If a defendant paid money into Court, it had to be taken in satisfaction. Then the Judicature Act permitted of several inconsistent defences: the difficulty was, first of all, how to reconcile them. One defence was denial of liability, and with the defence the defendant might pay money into court which the plaintiff might accept in satisfaction of his claim, if it was a claim for a debt or damages. Here the defendants claim an absolute right, a claim that is not in the least inconsistent with their having paid money into court in satisfaction of the plaintiff's claim for damages but with their denial of liability. How is it possible to suppose that a defendant's claim of right is settled merely because damages in respect of a past alleged infringement of the plaintiff's right are settled by payment of the money into court, and by the plaintiff taking that money out? I can see no reason why the defendants should not go on with their claim of right, or why they should not go on with their counter-claim.

The result is that I consider Stirling J. to have been right throughout, and that this appeal must be dismissed with costs.

Solicitors: *Rowcliffes, Rawle & Co., for Fulton & Pye-Smith, Salisbury; Horne & Birkett.*

G. I. F. C.

In re HALE.
LILLEY *v.* FOAD.

[1897 H. 2214.]

C. A.
1898
BYRNE J.
Nov. 7, 8.
C. A.
1899
May 31.

Mortgage—Business—Receiver and Manager—Executor of Mortgagor, Agent for—Debt—Simple Contract—Part Payment by Receiver—Promise to Pay, Inference of—Acknowledgment—Statute of Limitations (21 *Jac.* 1, *c.* 16), *s.* 3—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 24.

H., the owner of a business, mortgaged it to S. to secure an annuity, the mortgage deed providing that S. might exercise the power of appointing a receiver under s. 24 of the Conveyancing Act, 1881, and, further, that the receiver might, if so directed in writing by S., "manage and carry on the business as he might think fit." H. continued to carry on the business from the date of the mortgage, and in doing so became indebted to the plaintiff for work done in connection with the business. The debt was unsecured, but it was arranged between H. and the plaintiff that H. should pay it off by fixed instalments. In June, 1891, after having paid some of the instalments, H. died leaving an executrix, and then, S.'s annuity being in arrear, S. by writing under the power conferred by the mortgage deed appointed a receiver of the business "with full power to manage and carry on the same as he might think fit." In August, 1891, the receiver paid the plaintiff a further instalment in reduction of his debt.

In a creditor's administration action commenced in July, 1897, by the plaintiff against H.'s executrix:—

Held, by the Court of Appeal (affirming Byrne J.), that the balance of the plaintiff's debt was not statute-barred, inasmuch as the receiver had, under the combined powers of s. 24 of the Conveyancing Act and of the mortgage deed, and also as agent for H.'s executrix, as he had been for H. himself (Conveyancing Act, 1881, s. 24, sub-s. 2), authority to continue paying the debt by instalments, and that there was, as incident to his authority, an implied promise that the balance should be paid out of H.'s assets.

Whether, if the case had rested solely upon the power of appointing a receiver under s. 24 of the Conveyancing Act, the receiver would have been justified in making a payment on account of the plaintiff's unsecured debt, *quære*.

THIS action was commenced by an originating summons taken out by J. E. Lilley, on behalf of himself and all other creditors of F. W. Hale, deceased, for the administration of Hale's real and personal estate, the defendant being Jane Foad,

C. A. 1899 HALE, *In re.* LILLEY *v.* FOAD.

the executrix of Hale; and the following issues were tried before Byrne J.—(1.) whether there was a debt due to the plaintiff or not; (2.) if there was a debt, whether it was barred by the Statute of Limitations.

By an agreement under seal dated December 13, 1886, and made between Jennette Von Swartwout and her husband, and F. W. Hale and his wife, after reciting that J. Von Swartwout was entitled to a certain patent medicine business for her separate use for life, and that Mrs. Hale was entitled as the owner for her separate use of the reversionary interest in the same business, it was agreed that the business should thenceforth be considered as belonging to F. W. Hale during the life of J. Von Swartwout, and after her death to Mrs. Hale, "subject and charged . . . . with an annnal sum of 520*l.* payable without any deduction except property tax (if any) during a period of five years from the date of these presents to" J. Von Swartwout, "her executors administrators (whether she shall survive for that period or not) by equal weekly payments of 10*l.*"

The agreement contained a covenant by Mr. and Mrs. Hale, jointly and severally, to pay the annuity of 520*l.*, and certain provisions as to how the business was to be carried on. Then followed a clause to the effect that if the annuity should fall into arrear for four weeks, or if Mr. and Mrs. Hale should sell or incumber the business, J. Von Swartwout, her agents or attorney, might enter into possession of and hold, manage, and carry on the same for her own benefit, and that the business should then be assigned to her subject to a proviso for redemption in the event of payment of the arrears of the annuity.

Clause 9 of the agreement was as follows: "In case the said J. Von Swartwout shall at any time become entitled to enter into possession of the business as aforesaid the powers conferred by the Conveyancing and Law of Property Act, 1881, upon a mortgagee when the mortgage money has become due shall, so far as the same are applicable to the terms and conditions of these presents, thereupon become exercisable. And it shall be lawful for the said J. Von Swartwout, either herself or by her agents or attorney, in lieu of taking possession or

before or after taking possession of the business, to exercise the power of appointing a receiver conferred by the said Act. And by way of extension of the provisions of the said Act it is hereby also agreed that any receiver appointed under the said power in that behalf shall be at liberty, if so directed in writing by the said J. Von Swartwout, her agents or attorney, to manage and carry on the business as he may think fit, and that any moneys he or the said J. Von Swartwout, her agents or attorney, may pay or expend for that purpose, and whether before or subsequent to redemption by the said F. W. Hale, or other the person or persons entitled to the business as aforesaid, shall be considered as charged upon the business with interest thereon at the rate of 5 per cent. per annum."

From the date of the deed Hale carried on the business, and in doing so became indebted to the plaintiff for printing. In October, 1888, the debt was 1000*l.*, and it was then arranged between them that this should be paid off by instalments of 25*l.* per month. These instalments were paid down to the time of his death by Hale, who in the meantime continued to carry on the business. He died on June 16, 1891, having by his will, dated August 29, 1890, given all his property to the defendant, Miss Jane Foad, and appointed her and one Richardson, who had acted as his manager, his executrix and executor. Richardson renounced probate, and the will was proved by the defendant only.

From Hale's death until July 29, 1891, the business was carried on by Richardson and one Lewis, who was also in Hale's employment at the time of his death, and for the purpose of carrying on the business they opened a banking account in their joint names and drew cheques on the account.

At the time of Hale's death the annuity was in arrear to the extent of 1010*l.*, and by a document under her hand, dated July 29, 1891, J. Von Swartwout, after referring to the agreement of December 13, 1886, appointed a receiver in these terms: "I hereby, in virtue of the powers vested in me for that purpose by the said agreement, appoint Frederick Johnson . . . . as receiver of the said business, with full power to manage and carry on the same as he may think fit, but subject

C. A. 1899 HALE, *In re.* LILLEY *v.* FOAD.

to the provisions and restrictions contained in the said agreement," such receiver to be remunerated by a percentage on his gross receipts.

After Hale's death there were paid to the plaintiff, on account of his debt, four several sums of 25*l.* each, the first being paid by Richardson on July 8, 1891, the second by Johnson, the receiver, on August 6, 1891, and the third and fourth on September 2 and October 2, 1891, by Johnson or under his direction, leaving a balance of 453*l.* claimed by the plaintiff as due to him. Another receiver was shortly afterwards appointed, and he on Mrs. Von Swartwout's instructions refused to pay any further instalments.

The plaintiff's summons was served on July 3, 1897, and therefore within six years after the payment made by Johnson on August 6, 1891. The case was heard by Byrne J. on November 7 and 8, 1898. With regard to the payment made by Richardson, his Lordship said the evidence was not sufficient to satisfy him that the payment had been made by him as agent for the defendant, Hale's executrix. The question, therefore, mainly turned upon the effect of the payments made by Johnson, the receiver.

Younger, for the plaintiff. The observations of Rolt L.J. in *Law* v. *Glenn* (1), and of Rigby L.J. in *Owen & Co.* v. *Cronk* (2), shew that the acts of a person appointed receiver by a mortgagee under the powers in a mortgage deed may affect the rights of people other than the mortgagor and mortgagee. Johnson's express authority to manage and carry on the business extended so far as to authorize him to pay a debt which had been incurred in the business, and, as he was the agent of the mortgagor under s. 24, sub-s. 2, of the Conveyancing Act, 1881, the payment by him was equivalent to payment by the mortgagor's executrix, and prevented time from running under the Statute of Limitations. At the earliest, time could only run from November, 1891, as until then there had been no default in payment: *Reeves* v. *Butcher*. (3)

(1) (1867) L. R. 2 Ch. 634, 641. (2) [1895] 1 Q. B. 265, 275.
(3) [1891] 2 Q. B. 509.

Astbury, Q.C. and *Montague Lush*, for the defendant. A receiver appointed by a mortgagee, though he may be the agent of the mortgagor, does not thereby become the agent of the mortgagor's executor, or, at any rate, he is not the agent of the executor so as to give an acknowledgment which will prevent the executor setting up the Statute of Limitations against a third person: *Harlock* v. *Ashberry* (1); *Chinnery* v. *Evans* (2); *Newbould* v. *Smith.* (3) Sect. 24, sub-s. 2, of the Conveyancing Act, 1881, does not enable the receiver to alter the rights existing between the mortgagor and persons other than the mortgagee. The sole object of the provision was to prevent the receiver, as the agent of the mortgagee, rendering the latter, by being in possession of the mortgaged property, liable to account to the mortgagor on the footing of wilful default. The only duty of the receiver is to act as between the mortgagor and mortgagee and to protect the property: *Jefferys* v. *Dickson.* (4) A payment does not prevent time from running unless it is made by a person who is liable to pay the debt: *Morgan* v. *Rowlands.* (5) The debt here was not an outgoing of the mortgaged property, and the receiver was under no liability or obligation to pay it: *Gosling* v. *Gaskell.* (6)

To prevent the Statute of Limitations running, the payment must be made under such circumstances as justify the inference that there is a new promise to pay the whole balance of the debt: *Wainman* v. *Kynman* (7); *Stamford, Spalding and Boston Banking Co.* v. *Smith.* (8) Johnson had no authority from the executrix to make such a promise.

[They also referred to *Bayly* v. *Went* (9) and *Hollis* v. *Palmer.* (10)]

BYRNE J. (after stating the facts). It is common ground, the first of these four payments having been made on July 8, 1891, and the last of them on October 2, 1891, that, if any

(1) (1882) 19 Ch. D. 539.
(2) (1864) 11 H. L. C. 115.
(3) (1886) 33 Ch. D. 127.
(4) (1866) L. R. 1 Ch. 183, 190.
(5) (1872) L. R. 7 Q. B. 493.
(6) [1897] A. C. 575.
(7) (1847) 1 Ex. 118.
(8) [1892] 1 Q. B. 765.
(9) (1884) 51 L. T. 764.
(10) (1836) 2 Bing. N. C. 713.

C. A. 1899 HALE, *In re.* LILLEY *v.* FOAD. Byrne J.

one of them can be properly considered as a payment raising the implication of a promise to pay the balance of the debt, the plaintiff has not the stumbling-block of the Statute of Limitations in his way.

I will take one of these payments, which was made by Johnson after he had been appointed under the document to which I have referred, and while he was under the power so conferred upon him carrying on the business with the duty imposed on him to manage and preserve the business and the various assets, and, amongst other things, the goodwill of the business which constituted a security for the annuity. Now, if the payment in question had been made by the defendant, the executrix, no question could have arisen. If the payment in question was made by her agent, authorized to make such a payment, unconditionally and without circumstances preventing the implication being raised which ordinarily arises from an unconditional payment—namely, that there is a new promise to be inferred from the transaction—then that payment is, in my judgment, a sufficient payment to prevent the operation of the statute.

The first question is, was the payment a proper one? I am clearly of opinion that it was. It has not been attacked as being an improvident payment, or a wrongful payment, or a payment made under improper circumstances, but it is said it was a payment made by the receiver without authority from the person liable, namely, the defendant, who was liable, of course, to the extent of the testator's assets, and not otherwise personally. What first, then, is the true result of the contract between the parties and the appointment of the receiver under it? In my opinion, the reference to the Conveyancing Act shews clearly that the intention of all the parties to that deed was that although Mrs. Swartwout was to have the power of appointing a receiver, that receiver when so appointed was to be the agent of the mortgagor, and not of the mortgagee, for the purpose of managing and carrying on the business, and for the other purposes enumerated expressly in the document in question, or imported into the document by reference to the statute. I think it was hardly disputed

at the end of the argument, and I do not see well how it could be, that Johnson, the receiver, was, as between the mortgagor and the mortgagee, agent for the mortgagor, and it is further conceded, as indeed it must be, that Johnson was responsible to the mortgagor, and liable to account to him for his receipts and for his doings as receiver. But two distinctions were sought to be drawn: first, that assuming that Hale, the testator, was to be regarded as the mortgagor within the meaning of the agreement—as undoubtedly, in my opinion, he was—although there was another person having an interest in the business after his death, his executrix was not necessarily to be regarded as in the same position; for it was urged that, although this was a debt arising out of business transactions, yet inasmuch as Hale alone was carrying on the business, he alone was the person to be sued; it was his private debt as much as any other debt, which he might owe independently of the business. I cannot accept this view. In my judgment, the executrix of the testator Hale occupied the same position as between herself and the mortgagee under the agreement—that is to say, the position of mortgagor and mortgagee within the meaning of the phrase as used in the document. The difference as regards their liability was of course this: Hale was liable to the whole extent of his assets, while his executrix would be liable to the extent of such of the same assets as came to her in her capacity of executrix of the testator. To that extent her liability was the same, and she was the person to be sued in respect of the debt. Now, the particular payment of 25*l.* with which I am dealing, after the death of the testator, was a payment which would have been, if he had been alive and carrying on business, justly and rightly due from him, and was a payment for which his executrix was liable and bound, if she had assets sufficient to pay. The payment having been made, it was in my opinion clearly a payment made on behalf of the mortgagor and by the agent of the mortgagor, such agent being the mortgagor's agent for the purpose of managing and carrying on the business, and making all proper payments necessary for the good conduct and for the preservation of the business. The payment was in those respects a

C. A. 1899 HALE, *In re.* LILLEY *v.* FOAD. Byrne J.

good payment; but it is ingeniously argued—I think perhaps more by Mr. Lush than by his leader—that if you investigate all these cases of part payment depriving the Statute of Limitations of its operation, you find that the true principle is that an unconditional payment is, standing alone, if made by the person liable to pay to the person entitled to receive, such evidence of a new promise to pay the balance of the debt, that it may be acted upon, and so destroy the operation of the statute. I think the matter stands thus: part payment of the debt takes the debt out of the statute. The ground is that any such payment is an acknowledgment of the existence of the debt, and from it the law raises the implication of a promise to pay the remainder. There may be circumstances connected with the payment which will prevent that implication arising, but in the present case I find no such circumstances existing, and then it remains to be considered whether there is anything in the argument addressed to me by Mr. Lush—whether, inasmuch as what you have to find is an authority to make a new promise to pay, you can distinguish that from an authority to do that which in point of law, and in the absence of express agreement, will raise the implied promise to pay. I think not. I do not think myself that it matters whether the appointment of the receiver is made with a direct authority in so many terms to make new promises to pay old debts, or whether the authority given to him is an authority to do such acts as will, from the inference to be drawn from those acts, raise the new promise to pay. It appears to me that in the present case the receiver, so long as he acted providently and rightfully, was entitled to manage this business by doing that which a prudent man owning the business would have done in his place had he been carrying it on on his own account. I think, therefore, that W. Johnson was justified in making the payment he did. I think that he made that payment unconditionally. I think he made it as agent of the mortgagor, who in this case was the executrix, and that it is right and legitimate, the payment having been made by the agent of the person liable to pay to the person entitled to receive, to act upon the implication that a new promise to pay the balance of the debt was thereby

constituted, and that on this ground alone, one payment being sufficient, the statute does not apply.

I have not gone through the various cases which were cited before me. Most of them have arisen as between mortgagor and mortgagee, but I will refer to what was said by Rolt L.J. in *Law* v. *Glenn* (1): "It was contended on behalf of the defendants, the Messrs. Martin, that the appointment of the receiver by the deed of even date with the plaintiffs' first mortgage (which was in the usual form of such deeds) did not constitute the receiver for all purposes the agent of the mortgagor, and that, in fact, the receiver must be deemed when in possession to have received the rents as agent of the plaintiffs, and that the only object and effect of the receivership deed was to prevent the plaintiffs from being charged in the accounts for wilful neglect or default. No direct authority was cited for this proposition, and if it were necessary now to decide it I should hold that it could not be maintained, and that the receiver must be treated as being for all purposes the agent of the mortgagor, and that the payments made by him to the mortgagee were payments by a mortgagor continuing in possession of the mortgaged estate." As I said, it is true that that was a case between mortgagor and mortgagee; but, to my mind, the same principle must apply so long as payments are made by the receiver within the authority conferred upon him. Those are to be referred to his agency for the mortgagor, and not to his agency for the mortgagee. I will just refer to one passage of the judgment of Rigby L.J. in *Owen & Co.* v. *Cronk* (2) bearing upon the point. The Lord Justice, in referring to an argument which had been addressed to him, said: "It has been said that, as the defendant is called a receiver, we must be guided by cases which have established the personal liability of executors or trustees who carry on a business. In my opinion those cases are in no way analogous to the present." After giving his reasons why he did not think they applied to the particular case which was before him, which was the case of a business being carried on by a receiver appointed by trustees for debenture-holders under a deed, he says: "The Court cannot

(1) L. R. 2 Ch. 634, 641. (2) [1895] 1 Q. B. 265, 274.

C. A. 1899 HALE, *In re.* LILLEY *v.* FOAD. Byrne J.

carry on the business itself, nor can it be responsible to the creditors. In order that cases of this kind may apply to the present case it must be shewn that the defendant carried on the business of the company upon similar terms. But when we look at the trust deed we find that it contains no such provision. The deed provides that the receiver, though appointed by the mortgagees, shall be deemed to be the agent of the mortgagors. It is said that this applies only as between the mortgagors and the mortgagees; but I do not think it can be so limited."

I think that it comes in each case to be a question, was the payment made by a person authorized as agent of the person liable or bound to pay to the person entitled to receive? I have given my reasons for coming to the conclusion in the present case that the payment to which I have referred was such a payment. There must, therefore, be a declaration that the plaintiff's debt is not statute-barred, and that he is entitled to prove for it against Hale's estate. The costs will follow the event.

F. E.

The defendant appealed.

C. A. The appeal was heard on May 31, 1899.

Astbury, Q.C., and *Montague Lush*, for the defendant, the appellant, urged the same argument as in the Court below.

Eve, Q.C., and *Younger*, for the plaintiff, were not called upon.

LINDLEY M.R. We need not trouble you, Mr. Eve. The case has been well argued, and the difficulties such as they are have been stated very clearly. The question has some novelty in it, and requires careful consideration. It is whether the payment made by Johnson, the receiver and manager to the plaintiff Lilley (who was an undoubted creditor of Hale), of one of the instalments of 25*l.* a month is sufficient to enable the plaintiff, who would be otherwise barred by s. 3 of 21 Jac. 1, c. 16, to prove for the balance of his debt against Hale's estate. Now, it is all-important to ascertain Johnson's authority. That authority was conferred by Hale under the deed of

December 13, 1886. Hale owed Lilley, in respect of business transactions, the sum of 1000*l.* This debt was unsecured, and there was an arrangement in Hale's lifetime that this debt of Lilley's should be paid off by instalments of 25*l.* a month, and, until June, 1891, Hale did pay these instalments as arranged. Then Hale died, and the defendant, Miss Foad, became his executrix. Then she was in this position: she could of course pay off Hale's mortgage, but, even if she did not pay it off, she was bound by the stipulations in Hale's mortgage, and, whether she liked it or not, the receiver appointed by the mortgagee would be her agent to the extent of the assets of the testator at the time. That would be her true legal position. Hale's death did not operate as a revocation of the mortgagee's power to appoint a receiver. She could not help herself; she was subject to the obligations of her testator.

I now turn to the power to appoint a receiver. To my mind, the authority of the receiver is all-important: it goes to the root of the whole case. The power to appoint a receiver is authorized by the 9th clause of the deed. [His Lordship read the first part of the clause enabling the mortgagee to exercise the power of appointing a receiver conferred by the Conveyancing Act, 1881, and continued:—]

Now, pausing there for a moment, I doubt very much whether it would be right to determine this case in favour of Lilley if no power was given to the receiver to act except in accordance with the power given by s. 24 of the Conveyancing Act, 1881; because, although it is quite true that he is the agent of the mortgagor and not of the mortgagee, the Act says what is to be done with the moneys received, and, among the matters enumerated, you do not find a power to pay a debt which does not affect the mortgaged property. I very much doubt whether the receiver could pay off an unsecured debt. He is to keep down the interest on the mortgage debt, and so on. Upon the Act alone I should feel a difficulty with regard to the payment of this unsecured debt if the deed contained nothing more than a power for the mortgagee to appoint a receiver under the Act. But the deed does not stop there; for it goes on thus: [His Lordship then read the clause purporting

C. A. 1899 HALE, *In re.* LILLEY *v.* FOAD. Lindley M.R.

to extend the provisions of the Act, and continued:—] That is to say, the receiver is "to manage and carry on the business as he may think fit": he is not only to act as receiver under the Act of 1881, but he is also to manage and carry on the business as he thinks fit.

Now, the mortgagee, having the power in her hands of appointing a receiver and manager, on July 29, 1891, appoints Johnson "as receiver of the said business with full power to manage and carry on the same as he may think fit, but subject to the provisions and restrictions" contained in the mortgage. I think Byrne J. was perfectly warranted in calling attention to the extension of the powers of the receiver, and this extension is all-important. What was Johnson's position when appointed receiver? Hale had died, and Miss Foad had been appointed his executrix; but that did not affect the powers in the mortgage deed, for Miss Foad could not help herself, and there was Johnson appointed by the mortgagee to be receiver of and to manage this particular business. Now, here was an old business debt outstanding, with regard to which Hale had in his lifetime given a promise for repayment by instalments. Johnson was informed of this, and what does he do? He proceeds to pay an instalment in the manner arranged. Can it be said that in doing this he was exceeding his authority? To my mind, there was no excess of authority whatever. What was it that he had authority to do? To go on paying the debt; and he was to do this by the authority of Hale's executrix. She did not herself give that authority; but she was bound by what her testator had done. There was, in my opinion, ample authority for Johnson to pay the debt by instalments.

Then comes the question, what was the legal effect of Johnson making these payments—three of them? In respect of what did he make these payments? He made them in respect of this debt, knowing perfectly well that there was a balance owing at the times he made them. Can it be said that he had no authority even to make a promise that the assets of the testator should be liable in future for the instalments, and that the balance of the debt should be paid out of those assets? I think he had. It seems to me that there was no excess of his

authority at all. In my opinion, an agent has authority to make a promise to pay a debt, and if he makes a payment on account of the debt, and nothing more is said or done, that payment is good, and any jury would infer from it a promise for the payment of the balance. The authority to promise, in my opinion, exists, and it appears to me to have been acted upon; and this is the key to the whole matter.

I should have felt some difficulty on this case if it had stood on s. 24 of the Conveyancing Act alone; but as it stands upon the large powers contained in the mortgage deed, I feel none. In my opinion, Byrne J. was quite right, and the appeal must be dismissed with costs.

SIR F. H. JEUNE. I agree with the judgment that has just been delivered. The whole question is, what was the authority Johnson had? A promise need not be made by the debtor himself: it is enough if it is made by an agent or person representing him. To take the common case of an executor: if he makes a promise of this kind, by making part payment, either personally or by his agent, there is no doubt that he binds the estate to pay the remainder. Why? Because it is his duty to pay the debts of the testator. So with a receiver. The case in the House of Lords of *Chinnery* v. *Evans* (1) goes so far as this, that it shews that a receiver, acting within the scope of his authority, can deal with a matter forming part of the mortgage security, and so can bar the operation of the statute by part payment of interest on the principal mortgage debt. The reason is, because he is acting within the scope of his authority. The question, therefore, comes back to this: Was Johnson acting within the scope of his authority? There is no doubt as to the importance of the terms of the power under which the receiver was appointed. I agree with the Master of the Rolls that it is difficult, looking at s. 24, sub-s. 8, of the Conveyancing Act, and the mode in which money coming to the hands of a receiver is to be dealt with, to see how a payment of this kind can properly be made by him. It is difficult, I will only say, to see how any receiver appointed under the Act could conduct a

(1) 11 H. L. C. 115.

C. A. 1899 HALE, *In re.* LILLEY *v.* FOAD. Sir F. H. Jeune.

business in the way this business has been conducted by the receiver in the present case, because while the sub-sections of the Act seem to refer to the different duties of a person appointed to receive money, not of a person appointed to carry on a business, here we have a person who has been expressly empowered to carry on a business, and whose duty it is to carry on that business. If you get so far, then, in my opinion, you find that it is the duty of the receiver to do what this receiver did. He had power to pay the debts of the business; and it is not shewn that this is not a debt in connection with Hale's business. At any rate, the receiver thought it was part of his business to pay off this debt by instalments in the same way as Hale had done. There was very good reason for Hale paying it by instalments, and I am very far from saying that it was not proper to pay the debt in the way in which it was being paid, because the payment by instalments of 25*l.* each prevented the creditor from coming down upon the assets at once for the whole sum, which might have been disastrous. In managing this business the receiver was, in my opinion, justified in paying this debt. Therefore, it seems to me, that Byrne J. was perfectly right in deciding that this receiver, in making this payment, was acting properly—that is, within the scope of his authority. Then the difficulty in the case vanishes. It is impossible to draw a distinction between a payment as a payment, and a payment as an act from which an inference of a promise is to be drawn—that is, a legal inference. Payment of part of a debt is an acknowledgment that it is part of a debt which has to be paid. It is impossible to draw a distinction between a payment as a payment, and a payment with regard to which there arises the legal inference of a promise to pay the whole debt. I think, therefore, that the appeal fails.

ROMER L.J. I also think that, by virtue of the deed under which the receiver was appointed, he had power, on behalf of his principal, the mortgagor, to pay the instalments of this debt in the same way, and with the same legal results, as if they had been paid by the executrix herself. He was, in my opinion, authorized to make these payments so as to acknowledge that

C. A.
1899
HALE, *In re.* LILLEY *v.* FOAD.

the balance of the debt was payable by Hale's estate, and should be paid. Therefore, these payments were duly and properly made so as to take the case out of the statute.

Solicitors: *Graham Gordon; J. B. & F. Purchase.*

G. I. F. C.

C. A.
1899
June 9, 10.

BLANDY-JENKINS *v.* EARL OF DUNRAVEN.

[1895 J. 1288.]

Evidence—Ancient Document tendered in Support of Ancient Possession—Act of Ownership—Declaration of Deceased Person against Interest—Admission by Tenant as to Landlord's Title.

In an action brought to determine the title to certain land, the plaintiff tendered in evidence an ancient document coming from the proper custody which purported to be signed by M., a tenant of a predecessor in title of the defendant, and which stated that J., a predecessor in title of the plaintiff, had been persuaded to stop all proceedings at law that he then had against M. for wilfully and without leave bringing his sheep and cattle on to J.'s freehold land therein specified (which was assumed to be part of the land in dispute) for which wilful trespass M. bound himself to pay 16*s.* costs, and that he would for the future keep his own and other people's sheep and cattle from trespassing on the said land to the utmost of his power:—

Held, that the document was admissible in evidence, not as an admission by the tenant as to title, in which case it would not be evidence against the landlord, but as evidence of an act of ownership by a predecessor in title of the plaintiff.

Decision of Byrne J. reversed.

The principle of *Malcomson* v. *O'Dea*, (1863) 10 H. L. C. 593, applied.

Papendick v. *Bridgwater*, (1855) 5 E. & B. 166, distinguished.

THIS was an appeal from a decision of Byrne J.

The action was brought by Mr. Blandy-Jenkins and another against the Earl of Dunraven and another to determine the question whether certain uninclosed land was the private freehold of the plaintiff Blandy-Jenkins, or was land over which the defendants were entitled to rights of common. At the trial of the action the plaintiffs tendered in evidence an ancient document, which was found in the muniment-room of the plaintiff Blandy-Jenkins amongst his title-deeds, and which related to

C. A. 1899 — BLANDY-JENKINS v. EARL OF DUNRAVEN.

the settlement of certain legal proceedings by one Richard Jenkins, a predecessor in title of the plaintiff Blandy-Jenkins, in respect of certain land which the plaintiffs stated they were prepared to prove formed part of the land in dispute.

The document bore date May 7, 1659, and it purported to be signed (by his mark) by David Morgan, who was a tenant of a predecessor in title of the defendant the Earl of Dunraven. It stated as follows :—

"Be it known to all men that Mr. Richard Jenkins of Pontinawell (out of the neighbourly love that he always had to his neighbour David Morgan of Karabat) has bin persuaded to stop all proceedings of law that he now has against the said David Morgan for wilfully bringing of his sheep and milking of his cows in Mr. Jenkins' freehold land without leve being known by the name of Croike Nant-ye-Kee, lying westward of a brook called Nant-ye-Kee and in length from a place called Such Pantè to a house called Pentrakee, for which willful trespass the said David Morgan binds himself to pay sixteen shillings costs, and that he will for the future keepe his owne and all other peoples sheep and cattle from trespassing on the said ground to the utmost of his power to which he has put his hand the day above written. In witness of us

(Mark) "David D. Morgan.
"Thomas Gwillim (mark).
"Evan E. Morgan.
"Thomas T. Morgan.
"David William."

Byrne J. held that this document, being an admission by a tenant as to his landlord's title, was, according to the principle of *Papendick* v. *Bridgwater* (1), inadmissible; and he decided the action in favour of the defendants. The plaintiffs appealed, and upon the appeal they again raised the question as to the admissibility of this document.

Abel Thomas, *Q.C.*, and *J. G. Wood*, for the plaintiffs. This document is admissible as evidence of an act of ownership,

(1) 5 E. & B. 166.

namely, the commencement of an action of trespass, by a predecessor in title of the plaintiff Blandy-Jenkins. It is an ancient document tendered in support of ancient possession and coming from the proper custody. It is true that the act of ownership is shewn only by the document itself; but its contents are presumed to be true from the necessity of the case, the reason being that "it is more expedient to run some risk of occasional deception, than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence": Taylor on Evidence, 9th ed. p. 428; Best on Evidence, 8th ed. p. 454; *Woolway* v. *Rowe* (1); *Tickle* v. *Brown* (2); *Jones* v. *Williams* (3); *Malcomson* v. *O'Dea*. (4) If Morgan had been a mere stranger, instead of being a tenant of a predecessor in title of Lord Dunraven, this document would clearly be admissible; but it may be argued that the document ought to be regarded as an admission by Morgan that he had no title—in which case it would not be evidence against the reversioner. That was the view taken by Byrne J., who rejected this evidence on the authority of *Papendick* v. *Bridgwater* (5); but that case is distinguishable on two grounds. In the first place, this document is tendered in evidence, not as an admission by the tenant as to title, but as evidence of an act of ownership; and, secondly, *Papendick* v. *Bridgwater* (5) is limited to a declaration against proprietary interest, and, so far as this document is to be regarded as an admission by the tenant, it is a declaration, not against proprietary, but against pecuniary interest. There is nothing in the document to shew that Morgan ever claimed any proprietary interest in the land, and, whatever was his position, if he had been living, he might have been called as a witness, and might have been asked whether Richard Jenkins did not commence an action against him for sending cattle on the land.

Eve, Q.C., and *Ingle Joyce* (*Stuart Moore* and *S. T. Evans* with them), for the defendants. To be admissible as evidence

(1) (1834) 1 Ad. & E. 114.
(2) (1836) 4 Ad. & E. 369.
(3) (1837) 2 M. & W. 326.
(4) 10 H. L. C. 593.
(5) 5 E. & B. 166.

C. A. 1899 — BLANDY-JENKINS v. EARL OF DUNRAVEN.

under the rule relating to ancient documents the document must itself be an act of ownership, such as a lease or a licence; but this document is a mere declaration of a fact which might, if it actually took place, have been an act of ownership. A mere narrative statement that there has been an act of ownership is not in itself an act of ownership: *Malcomson* v. *O'Dea*. (1) If the writ or bill had been tendered that might have been put in, because that in itself would or might constitute an act of ownership. No doubt if Morgan had been alive he might have been asked whether the proceedings referred to in the document took place; but it does not follow that evidence is admissible post mortem which might have been taken if the man were alive.

[ROMER L.J. Morgan is dead, and this is a declaration against pecuniary interest. These are the words of Bayley J., quoted in Stephen's Digest of the Law of Evidence, p. 36: "A declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest."]

This is against proprietary interest, but not against pecuniary interest, and it is therefore open to the objection that it is an admission by the tenant as to the landlord's title. A declaration against pecuniary interest is where a man admits the receipt of money. If this is against pecuniary interest, every agreement in which a party agrees to pay rent might be admissible as against pecuniary interest. Before this document can be received in evidence you must get rid of the disability which existed by reason of the position in which Morgan stood with respect to the person against whom the evidence was going to be used.

[ROMER L.J. Roscoe's Nisi Prius, 16th ed. pp. 53, 54, contains a variety of cases in which documents have been admitted as acts of ownership.]

The rule is explained in *Bristow* v. *Cormican* (2) and *Roe* v. *Rawlings*. (3) There is no case in which it has been extended

(1) 10 H. L. C. 593. (2) (1878) 3 App. Cas. 641.
(3) (1806) 7 East, 279.

to anything beyond documents which in themselves purport to be acts of ownership.

Further, taking legal proceedings is not an act of ownership: it is merely making a claim, which may be done by anybody; it is not as if there were a judgment against Morgan.

If an acknowledgment by Morgan that he had no right of common would not be evidence against us, a fortiori this statement would not be. Morgan was not the agent of the reversioner, who could not have prevented him from doing what he says he did. This evidence cannot be effectual except as against Morgan and persons claiming under him.

LINDLEY M.R. I cannot bring myself to doubt the admissibility of this document. What it is worth is another thing. It is an ancient document. You cannot tell whether an ancient document is admissible in evidence against anybody till you look at it. You must look at it to see what it purports to contain. When you look at this document you find it contains a great deal. If the document did not contain that which I shall rely upon presently, it would not be admissible. But when you come to look at it, what does it shew? It purports to shew, and does shew, that a person named Jenkins had been persuaded to stop some proceedings which he had taken against a man named Morgan for trespassing on what Jenkins called his freehold by bringing sheep and cattle there. It shews upon the face of it that Jenkins must have been in possession, or else he would not have brought an action of trespass. He speaks of trespass: the word is used in the document itself. It is not an act of ownership, I agree, but it is a document which shews that the person in possession is vindicating that possession against somebody by making him take off his cattle. To my mind it is evidence of an act of ownership; I do not say it is an act of ownership.

Then the question arises, what custody does it come from? It comes from the muniments of a successor in title to the man named Jenkins. So that the custody in which it is found is the place where one would expect such a document as this to be kept—that is to say, it is kept by those who are interested in

C. A. 1899

BLANDY-JENKINS v. EARL OF DUNRAVEN.

Lindley M.R.

the land the possession of which was vindicated by Jenkins. It comes out of the proper custody.

Now, why is not that admissible against anybody, whoever he may be? What is the principle upon which ancient documents which shew acts of ownership are admissible? That has been discussed in old cases and in comparatively modern cases. The most modern case of any real importance as to the admissibility of this class of evidence is *Malcomson* v. *O'Dea* (1), in which Willes J., who delivered the opinion of the judges, says this, which I thoroughly indorse (2): "We are not disposed to narrow the bounds of the law of evidence with respect to ancient possession." You cannot prove what has happened in the past without having regard to ancient documents; and if you find an ancient document which does shew that a person in possession of land vindicated that possession it is contrary to all common sense to disregard it. Referring to the rule as to the admissibility of ancient documents, he says (3): "That rule is, that ancient documents coming out of proper custody"—we have that here—"and purporting upon the face of them to shew exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession." Now, is this an ancient document which purports upon the face of it to shew exercise of ownership? I say unquestionably Yes; it is not an act of ownership, but it shews that there was an act of ownership. On that ground, it seems to me, it is admissible. For the reasons I have given I think that the case of *Papendick* v. *Bridgwater* (4) has no application. This document is not an admission by the tenant against the landlord; it comes under another head altogether.

SIR F. H. JEUNE. I agree. It seems to me quite correct to say we must look at this document and see what it really says. It appears to me it might be used in two ways—first, as shewing that Mr. Richard Jenkins brought an action or

(1) 10 H. L. C. 593.
(2) Ibid. 616.
(3) 10 H. L. C. 614.
(4) 5 E. & B. 166.

commenced proceedings against a person for wilful trespass; secondly, as shewing that the person against whom he took proceedings, who was in fact the tenant of a predecessor in title of the defendant, yielded to the action, and practically acknowledged that the plaintiff was right by binding himself to pay certain money. Looking at the case from the latter point of view, I am not prepared to say, and I do not think it necessary to decide, that as an acknowledgment by David Morgan, the tenant, that could be evidence against his landlord, because the principle of *Papendick* v. *Bridgwater* (1) appears to me to apply. It is true it is not a direct admission by the tenant, but it is practically equivalent to it, and I am not prepared to say that this document is admissible as an acknowledgment by the tenant that his landlord, or he in respect of his land, had no rights of pasture or turning out upon this area; but looked at merely as a statement of certain facts, it seems to me to be admissible on the ground that it is a statement by a deceased man against his pecuniary interest, and therefore not within the rule as to the inadmissibility of statements by a deceased person, and it proves what it states—namely, that an action was brought. What the effect of that may be, and how far that is an act of ownership which is valuable in this case, is another question. I have no hesitation in saying that this document is clearly evidence of such an act of ownership, if act of ownership it be.

ROMER L.J. I agree in thinking that this document is admissible in evidence. Now, in the first place, it is primâ facie admissible if relevant, because it is a statement by a deceased person who had peculiar means of knowing the matter stated, and had no interest to misrepresent it, and because the statement was opposed to his pecuniary interest, as is evidenced by looking at the document itself. The next question then is, are the facts stated relevant? In my opinion they are, for they shew an act of ownership by Mr. Jenkins. Of course, I am assuming for the moment that it will hereafter be established, which may or may not be the case, that the land referred to here is

(1) 5 E. & B. 166.

C. A. 1899 BLANDY-JENKINS v. EARL OF DUNRAVEN. Romer L.J.

the land which is the subject of this action, or some part of it, and we admit the evidence subject to that being established. This document tends to shew, so far as it goes, property in Jenkins in the land in question, for it shews a sum paid or to be paid to Jenkins for a trespass on the land—that is to say, to my mind, it is like a document shewing a payment to Jenkins for a licence to some one to use the land. I cannot see that any useful distinction can be drawn between these two cases. It has been said that the document ought not to be admitted, because it amounts to evidence by a tenant against his reversioner, and reference was made to the case of *Papendick* v. *Bridgwater*. (1) That case, in my opinion, is quite distinguishable. There what was sought to be put in evidence was a mere declaration by the tenant that he had no right in respect of his landlord's property which was the subject of the action. What was sought to be put in was not any evidence of an act done, but, as Erle J. pointed out, a mere abstract statement, and he says this: "The case is distinguishable from that of evidence of acts of user or interruption, which now may be properly admitted." In that case the evidence of the tenant was properly rejected, because the tenant himself, if living, could not have given the evidence that was there sought to be given. An admission by the tenant that he had no title—or a past admission by a tenant that he had no title—is irrelevant, because it cannot be used as evidence against the reversioner. A mere admission by a tenant that he has no title cannot amount to an admission by a reversioner, or bind the reversioner. In this case, this document is admitted by us, not because it is, or as being, an admission as to title by the tenant, but as evidence of the facts stated in the document—the acts of ownership. If Morgan were living, clearly he could be asked to give evidence of the facts stated in this document. Those facts would be relevant, and would tend to support Mr. Jenkins' title; and Morgan, if living, could not have refused to answer those questions; nor could Morgan's landlord have said that that evidence was not admissible because Morgan was his tenant. Then, if the statements of

(1) 5 E. & B. 166, 180.

this deceased man Morgan are admissible on the grounds that I have pointed out, the next question is, are not those statements of the dead man evidenced by this document—that is to say, is the document in itself evidence of those statements of the dead man? I think it is. It is an ancient document admittedly coming from the proper custody, and it appears genuine. It appears, so far as I can see, to be an original document, and it is admissible because, as pointed out by the Master of the Rolls, it shews acts of ownership. I agree with what he has stated—that the general rule as to documents of this class ought not to be restricted in the manner contended for by those who are opposing the admission of the document in this case.

[Ultimately the Court held that the plaintiffs had failed to prove that the land referred to in the document was part of the land in dispute, and dismissed the appeal.]

Solicitors: *Thomas White & Sons, for Randall & Co., Bridgend; Frere, Cholmeley & Co.*

H. B. H.

NORTH J.
1899
March 11, 17, 18, 21.

In re BORAX COMPANY. FOSTER *v.* BORAX COMPANY.

[1899 B. 608.]

Company—Debentures—Floating Charge—Sale of Business—Injunction.

A company with power to amalgamate with or sell its business and assets to another company of the same kind, contracted so to sell. In an action on behalf of holders of debentures charged on the assets of the company, and maturing in case of a winding-up, an injunction was granted to restrain the company from parting with its assets.

THE plaintiff Arthur Foster was, as holder of debentures in a former company, entitled under a reconstruction scheme to 114 A 50*l.* debentures of the defendant Borax Company to bearer, bearing interest at 4 per cent., and 114 B 50*l.* debentures of the defendant company to bearer, bearing interest at 6 per cent., payable subsequently to the A debentures only out of net revenue of each year. The total issue of each series was 2952 of 50*l.* each. Payment of principal and interest was charged by way of floating security on all the property, undertaking, and assets for the time being, whether present or future, of the company. The company had power to pay off the debentures on giving six months' notice. There was provision for the creation of service funds for payment of interest on and the gradual redemption of each set of debentures.

It was provided that the principal secured by the debentures of each series should become immediately payable if an order was made or an effective resolution passed for the winding-up of the company.

Among the objects defined by the memorandum of association of the Borax Company were the sale to and amalgamation with any other company with similar objects.

An agreement was made, dated November 29, 1898, between the Borax Company, Limited, as vendors, and Lafayette Hoyt De Friese, as purchaser, which recited that a company to be called "Borax Consolidated, Limited," or by some other name, was about to be formed. The agreement provided for the

sale of the assets of the Borax Company, with the exception of securities to the value of between 23,000*l.* and 24,000*l.*, to De Friese, as on October 1, 1898, for 320,000*l.* to be paid—

"(*a.*) 100,000*l.* at the option of the purchaser either in cash or as to the whole or any part thereof by the issue or transfer to the company or as they may direct of mortgage debenture stock hereinafter referred to of the new company to be treated as of par value.

"(*b.*) 150,000*l.* at the option of the purchaser either in cash or as to the whole or any part thereof by the allotment or transfer to the company or as they may direct of fully paid-up cumulalative preference shares of 10*l.* each hereinafter referred to of the new company to be treated as of par value.

"(*c.*) 70,000*l.* by the allotment or transfer to the company or as they may direct of 7000 fully paid-up ordinary shares of 10*l.* each hereinafter referred to of the new company."

Art. 3 of the agreement provided that the purchaser or the new company should out of the transferred property satisfy business liabilities of the company outstanding on October 1, 1898, and incurred afterwards.

The purchaser undertook to form the new company with the object (inter alia) of taking over the business and assets of the Borax Company.

The agreement contained provisions relating to the memorandum, articles, debentures, covering deed, and capital of the new company, and for an agreement to be entered into by the purchaser for the sale to Henry Evan Thomas, as trustee for the new company, of (inter alia) the business and assets of the selling company. The purchase was to be completed within four months.

Arts. 9 and 10 provided:—

"9. The company shall until completion carry on its business in the same manner as heretofore so as to maintain the same as a going concern and shall not deal with or dispose of any of the premises hereby agreed to be sold except for the purpose and in the course of carrying on its business in the ordinary way. As from the 30th day of September, 1898, the company shall be deemed to have been and to be carrying on the said

NORTH J. 1899 BORAX COMPANY, *In re.* FOSTER *v.* BORAX COMPANY.

business on behalf of the purchaser and shall account for all the benefits and profits received and be indemnified against all expenses and liabilities incurred in the course of carrying on the same.

"10. Subject to clause 9 of this agreement the company shall not after the date of this agreement carry on business as miners refiners distillers or manufacturers of or dealers in boracite borax boracic acid or similar ores substances or products or as owners of borate or other similar properties otherwise than in conjunction with and for the benefit of and on behalf of the new company."

In accordance with the agreement last mentioned, an agreement dated January 10, 1899, was made between Lafayette Hoyt De Friese and Henry Evan Thomas, as trustee for the new company, for the sale to the intended new company of the assets and businesses of the Borax Company, Limited, and five other companies, following, so far as the property of the Borax Company was concerned, the terms of the agreement of November 29, 1898.

In pursuance of the above agreements, Borax Consolidated, Limited, was registered on January 11, 1899, with the object of acquiring the five undertakings comprised in the agreement of January 10 between De Friese and Thomas, and seven other businesses or undertakings connected with the production of borax, with a share capital of 1,400,000*l.* and power to issue debenture stock to the amount of 1,000,000*l.*

It was proposed to give the holders of debentures in the Borax Company, Limited, debentures in Borax Consolidated, Limited, of equal amount to the debentures they held in the Borax Company in exchange for such debentures. Holders of debentures to the amount of 96,650*l.* had consented. The plaintiff was the only person who had actively objected. It was not in evidence whether the holders of the other debentures, which amounted to 187,150*l.*, desired to accept the offer.

The plaintiff commenced this action to restrain the Borax Company, Limited, from parting with their property, undertaking, and assets. A motion was now made on his behalf for an interlocutory injunction in terms of the claim.

The defendants were the Borax Company, Limited; Borax Consolidated, Limited; Lafayette Hoyt De Friese, and a Mr. Bishop, added as a representative consenting debenture-holder.

Vernon Smith, Q.C., and *Clauson*, for the plaintiff. What the defendant Borax Company is doing is putting an end to the substratum of their business. The charge of the debenture-holders thereby attaches, if not under the strict words of the debentures, by implication; they have at least a right to prevent the assets from being parted with and their security destroyed till they are paid off: *Hubbuck* v. *Helms* (1); *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (2); *In re Panama, New Zealand and Australian Royal Mail Co.* (3); *Wallace* v. *Universal Automatic Machines Co.* (4)

Henry Terrell, Q.C., and *Cassel*, for the defendant De Friese.

Swinfen Eady, Q.C., and *Abraham*, for the Borax Company. No event has happened to make the charge of the debenture-holders attach. The Borax Company is not being wound up; it is still carrying on the objects defined in its memorandum, under which it has power to sell its assets to or to amalgamate with another company. The debenture-holders will not, by what is proposed to be done, be deprived of their security; they have a floating charge on the assets of the company, including the consideration to be received for the sale. The Borax Company will still carry on business till the completion of the contract, and, at any rate, till that time the charge does not attach. The plaintiff is endeavouring to interfere with what is expressly authorized by the articles, which he has no right to do: *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (5); *New Zealand Gold Extraction Co.* v. *Peacock* (6); *Willmott* v. *London Celluloid Co.* (7); *Robson* v. *Smith.* (8)

(1) (1887) 56 L. J. (Ch.) 536.
(2) [1897] A. C. 81.
(3) (1870) L. R. 5 Ch. 318.
(4) [1894] 2 Ch. 547.
(5) [1892] 3 Ch. 454.
(6) [1894] 1 Q. B. 622.
(7) (1886) 34 Ch. D. 147.
(8) [1895] 2 Ch. 118.

NORTH J.
1899
BORAX COMPANY, *In re.*
FOSTER *v.* BORAX COMPANY.

Everitt, Q.C., and *Kirby*, for Borax Consolidated, argued in addition, that if a sale of the whole assets could be objected to, as destroying the substratum of the selling company, the objection did not extend to an amalgamation, and what was here contemplated was an amalgamation and not a sale: *Wall* v. *London and Northern Assets Corporation.* (1)

Hon. E. C. Macnaghten, Q.C., and *Stokes*, for Bishop.

Vernon Smith, Q.C., in reply.

Swinfen Eady, Q.C., for the Borax Company, offered to deposit a sum of 11,400*l.* in court, which was more than sufficient to provide for the indebtedness to the plaintiff.

Vernon Smith, Q.C. The plaintiff represents not only himself but all the debenture-holders who have not assented.

NORTH J. I think this a very important case, and one in which either of the parties will no doubt be desirous of taking the opinion of the Court of Appeal, and, if they do, it ought to be done as soon as possible; therefore I do not propose to reserve judgment, and, having heard the matter fully argued, I will deal with it at once. Nor do I think there is much difficulty about the law: I have heard the cases cited on both sides, and I do not think they conflict or cause difficulty. The real difficulty in the case is applying the decisions in those cases to a state of facts which seems to me to be totally different from the state of facts found in any of those cases. [After stating the facts, his Lordship continued:—]

The question is whether the Borax Company can so deal with its assets as to effect such a change in the position of the debenture-holders, who at present have a first charge, a floating charge on the assets of the company, as would be produced by taking that away from them, and giving them instead a charge upon the debenture stock, preference shares, and ordinary shares of another company which are to make up the purchase-money. Now, it seems to me that the effect of what is being done is to put an end to the carrying on of the business of the Borax Company in such a way as to entitle the debenture-holders to say that their claim attaches to the property of

(1) [1898] 2 Ch. 469.

the company which has not as yet been transferred by the Borax Company to the new company. The debentures are a floating security, and not a specific charge on any particular item of property so long as the business of the company is going on. This seems to me to be really the special test: is the business upon which the debenture money is lent being continued or not? In my opinion in this case it is not, because the company is ceasing absolutely and entirely to carry on the borax business. The trade in borax is to be concentrated in one new company, and the old company will only have such interest in it as arises from their having received the debenture stock, the preference shares, and the ordinary shares of the new company, which are the purchase-money of the property of the old company now being sold. They may keep that undistributed. A great point has been made that the old company will really be continuing to carry on the business to be carried on by the new company. That seems to me to be an idle suggestion. They are to carry it on for a little while under the terms of the agreement, but as from September 30, 1898, what is contemplated is their merely acting as agent for the company to whom they have contracted to sell, and that company is to receive every farthing of the profits, and to indemnify the old company against all liabilities they incur in carrying on business during that period. [His Lordship, after considering the effect of a provision for the nomination by the Borax Company of a director in the new company while holding shares, continued:—]

The old company, the Borax Company, will, if this transaction is carried through, simply be the owners of the considerations they will have received, and will hold those considerations so as to receive whatever dividends or interest may be payable in respect thereof.

Then it has been said that under the articles the Borax Company has a clear power to amalgamate with other companies, and has a clear power to sell. I do not think it makes very much difference which they have done; because if it is an amalgamation they have power to amalgamate; but if, on the other hand, it is not an amalgamation, they have power

NORTH J. 1899 BORAX COMPANY, *In re.* FOSTER *v.* BORAX COMPANY.

to sell; and in my opinion it is a case in which they have in reality sold and not amalgamated. As I have said, I do not think it matters very much which it is. My reason for thinking it is not an amalgamation is this—the old company are only one of several bodies which sell their assets to a new company, and then that new company is to consist of a great many other persons—preference shareholders, and so on—who are invited to come in and subscribe to the company. I do not think it can be said the Borax Company, the old company, is carrying on business at all. It is difficult to see how, if the companies are amalgamated, a winding-up of one should not be the winding-up of the other, and yet it is quite clear the winding-up of the one would not be a winding-up of the other. I think it is a sale. I do not think it makes any difference; and I only say that because the point has been pressed on me. It is said that the proposed arrangement would be very much for the advantage of the debenture-holders, and that something like one-third of the whole number of debenture-holders are willing that it shall be carried out. The only opponent that I know of is the plaintiff with his 11,000*l.* in debentures; but there is the very large body of holders of 187,150*l.* worth, whose views upon the subject I do not know at all. The debentures are payable to bearer, and it may be that the holders know nothing about what is going on; but the fact remains that there is that number whose assent has not been gained, though they have not dissented.

My judgment turns upon this. In my opinion the company is, within the meaning of the cases, ceasing to carry on the business which it was carrying on at the time when the debentures were invited, subscriptions received, and the money paid; and that under those circumstances, as what is proposed to be done is not the carrying on of the business at all, but is selling the business to a new company, who are taking it over upon terms which certainly alter very materially indeed the security which the debenture-holders have, in my opinion the defendants are not entitled to do that against the wishes of the debenture-holders. So far as any debenture-holders consent, their course is clear; but in my opinion the proper course is for me to grant

an injunction to restrain the carrying out of the proposed sale by the Borax Company to Mr. De Friese and to Borax Consolidated, without first making due provision for the payment of the debenture-holders whose assent to such transfer has not been obtained.

As regards the offer to deposit the 11,400*l.*, I do not see that I can decline to grant an injunction on the terms of that being done. The plaintiff is at present suing on behalf of himself and all the debenture-holders.

Solicitors: *Linklater & Co.; Clements, Williams & Co.; Ashurst, Morris, Crisp & Co.; W. H. Paterson; Parker, Garrett & Holman.*

NOTE.—The Borax Company appealed. The appeal came on for hearing on May 11 before the Master of the Rolls and Rigby and Collins L.JJ. In the meantime the appellants had obtained the assent of other debenture-holders to the proposed scheme, so that there remained only a balance of 16,800*l.* held by persons including the plaintiff who had not assented. The appellants offered to pay 16,800*l.* into court to abide the result of the trial; and that having been done an order was made that the injunction should be discharged, costs to be costs in the action.

D. P.

NORTH J.

1899

May 18; June 15.

In re BISHOP OF BATH AND WELLS.

[1899 B. 942.]

Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *s.* 2, *sub-s.* 1—"*Settlement*"—"*Succession*"—*Ecclesiastical Land—Land granted by Bishop to Grantee for Life, but during his Tenure of an Ecclesiastical Office.*

Some houses in a cathedral city had from time immemorial been granted by the bishop of the diocese for the time being to one of the ecclesiastical dignitaries, for his life. The deed of grant was called a "collation," and the grantee was "inducted" by the registrar of the diocese into possession of the property.

By the last deed of collation the bishop granted the houses to the then archdeacon of the city for his life, but so long only as he should continue to be archdeacon. On the deed was indorsed a certificate signed by the registrar that five days after the date of the deed the grantee was duly inducted by him into the actual corporal possession of the property. Upon a summons by the archdeacon, with the approval of the bishop, asking that trustees might be appointed for the purposes of the Settled Land Act of the settlement created by the deed, the object being that the archdeacon, as tenant for life, or having the powers of a tenant for life under the Act, might sell the houses, and that the proceeds of sale might be invested in the names of trustees, and the income thereof paid to the persons who would have been from time to time entitled to the rents of the houses if unsold:—

Held, that this being ecclesiastical property, the Settled Land Act did not apply to it.

The application was accordingly refused.

Observations of Stirling J. in *Ex parte Vicar of Castle Bytham*, [1895] 1 Ch. 348, approved and adopted.

SUMMONS by Edwin Arthur Salmon, Archdeacon of Wells, asking that George Wyndham, Bishop of Bath and Wells, the Dean of Wells, and the Chancellor of the diocese, might be appointed trustees for the purposes of the Settled Land Act, 1882, of a settlement of four messuages situate in the market place in Wells, alleged to have been created by a deed dated January 19, 1898, under the hand and episcopal seal of the bishop. The bishop was named as defendant to the summons.

The deed of January 19, 1898, was indorsed, "Collation of the Venerable Archdeacon Salmon to a canonical property in the market place at Wells." The deed was a deed-poll, and

was addressed by the bishop to the archdeacon. The deed continued: "We do hereby freely and out of mere good will give grant and confirm unto you the said Edwin Arthur Salmon all that canonical property or 'rib,' formerly a canonical house with the appurtenances thereto, situate on the south side of the market place in the city of Wells and now comprising the following properties, namely, First the income from a sum of 700*l.* Consols or any other funds or securities for the time being representing the purchase-money paid by the town council of Wells in the year 1779 for an old canonical house formerly standing on the south side of the market place in the city of Wells, and which sum of Consols is now vested in the names" of three persons mentioned. "And, secondly, all those four several messuages or tenements situate on the south side of the market place in Wells"—of which a description was given—"all which said several premises first and secondly described were formerly in the tenure of the Very Rev. G. H. Law Dean of Gloucester and Archdeacon of Wells and lately of A. O. Fitzgerald late Archdeacon of Wells and are by his death lawfully vacant and in full right belong to our donation and collation by reason of our Bishoprick, to have, hold, occupy and possess and enjoy the income of the said trust fund of 700*l.* Consols, or of the securities for the time being representing the same, and also the said several messuages or tenements and premises and all and singular other the appurtenances &c. unto you the said E. A. Salmon for and during the term of your natural life, but so long only as you shall continue to be Archdeacon of Wells, subject to the several leases for lives under which the same are now held (but without power to lease the same on further or other lives). Upon this condition nevertheless" that the grantee should at his own cost keep the premises in repair "during the said term or so long as you shall hold and enjoy the same."

This deed was registered in the registry of the diocese on January 19, 1898, a memorandum to that effect signed by the registrar being indorsed on the deed. There was also indorsed on it the following certificate signed by the registrar: "I hereby certify that on January 24, 1898, the within named E. A.

NORTH J. 1899 — BISHOP OF BATH AND WELLS, *In re.*

Salmon was duly inducted by me into the actual corporal possession of the premises in the market place, Wells."

In support of the summons an affidavit was made by Archdeacon Salmon. It contained statements to the following effect.

The messuages above mentioned form (together with a sum of 700*l.* Consols, standing in the names of the bishop, the dean, and the chancellor of the diocese) what is known as a canonical property or "rib." The 700*l.* represents the proceeds of the sale of a canonical house of residence, to which the four messuages were appurtenant, and which was sold under the provisions of a private Act of Parliament in the year 1779 (19 Geo. 3, c. xxxi.), by which Act it was also provided that the 700*l.* Consols should be held by the bishop, dean, and chancellor for the time being on the trusts mentioned in the Act. "The said property has from time immemorial been granted or given by the Bishop for the time being to some one of the dignitaries or prebendaries of the cathedral church of Wells for life. It is not and never has been assigned to any particular dignitary or prebend, nor has the enjoyment of it carried with it any obligation to perform any ecclesiastical or spiritual duty. It is not and never has been held by any corporation sole as such corporation." After stating the effect of the deed of January 19, 1898, and the indorsement on it, "Collation &c.," the affidavit continued: "It is not however in form a collation, nor does it contain any words of collation, and it is, I am advised and submit, improperly called a collation." "There are other properties which have been immemorially treated in the same way as the property hereinbefore mentioned. All these properties (known as 'ribs') have been given or granted by the Bishop of Bath and Wells for the time being on the death or resignation of their holders by instruments similar to the deed of January 19, 1898. Before the year 1845 these transactions were and still are completed and the donees put into possession by livery of seisin and not by induction, and there has never (so far as can be ascertained) been induction into any of these properties. On the other hand, the donee or grantee of the property has always (so far as is known) subscribed the articles of religion

and the declaration of conformity, and taken the oaths as on admission to a benefice. These properties have also been assigned from time to time in the same manner as a benefice." The deponent submitted that the deed of January 19, 1898, was a settlement within the meaning of the Settled Land Act, 1882, and that he was tenant for life of the four messuages within the meaning of the Settled Land Act, 1882, or had the powers of a tenant for life for the purposes of the Act. "It is, I am advised and believe, in the interest of myself and of the future holders of the said property, that the said messuages should be sold and the proceeds held and the income thereof enjoyed in like manner as the said sum of 700*l.* Consols and the income thereof respectively. I desire, therefore, to exercise in respect of the said messuages the powers of a tenant for life under the Settled Land Acts, and to that end I request the Court to appoint the persons named in the summons as trustees under the said settlement for the purposes of the Settled Land Act, 1882. . . . . The bishop as patron or donor of the said property approves of my action in the matter."

The Act, 19 Geo. 3, c. xxxi., is intituled, "An Act for building a new assize or town hall and market house, within the city or borough of Wells, in the county of Somerset; and for regulating the markets within the said city or borough." The Act contained (inter alia) recitals to the effect that the assize or town hall and market house within the city of Wells had lately been taken down, and there was not then any assize or town hall or market house within the city; that the Rev. William Willes, Archdeacon of Wells, and one of the prebendaries of the cathedral, "hath been collated to, and is possessed, during the term of his natural life, of a capital messuage or dwelling-house, commonly called a canonical house, situate within the liberty of St. Andrew in Wells aforesaid . . . . of which said capital messuage or canonical house Charles Lord Bishop of Bath and Wells, in right of his see, is patron." The Act provided for the purchase of the said canonical house by the corporation of Wells in consideration of the capital sum of 700*l.* Consols to be transferred by them to trustees appointed by the Act, and that upon the transfer being made the canonical

NORTH J. 1899 BISHOP OF BATH AND WELLS, *In re.*

house and its appurtenances from and after March 25, 1779, should be divested out of William Willes, and the bishop and his successors, as patrons thereof, and should vest in fee simple in the corporation of Wells, their successors and assigns, for the purpose of erecting an assize or town hall and market house upon the site thereof.

The Act provided that the trustees therein named, and the survivors and survivor of them, and after the decease of such survivor, the bishop, the dean, and the chancellor of the diocese for the time being, should stand possessed of the 700*l.* Consols and of the income thereof respectively upon trust, at the request and by the direction, or with the privity and consent, of Charles Bishop of Bath and Wells, or his successors, and also of the said William Willes, during the term of his life, to invest the 700*l.* Consols, or the proceeds of the sale or transfer thereof, in the purchase of the fee simple and inheritance of a fit and convenient messuage for the residence of the said William Willes, during the term of his life, or of lands, tenements, or hereditaments, to be situate somewhere in the county of Somerset, and to convey such messuage, or such lands, &c., so to be purchased, unto the said William Willes (in case he should be then living), for and during his life, and from and after his decease (or in case he should not be living at the time of making the conveyance, then from and after the making of the conveyance) to the use of Charles Lord Bishop of Bath and Wells, and his successors for ever, as patrons as aforesaid. Until the purchase of a house or land the trustees were to pay the income of the 700*l.* Consols unto the said William Willes during the term of his life, and after his decease "the several persons who shall from time to time be collated to the three messuages . . . . to receive and take the interest, dividends and annual produce of" the 700*l.* Consols "to and for their own use and benefit respectively." It was further provided that "nothing in this Act contained shall extend, or be construed, deemed, or taken to extend, in anywise to prejudice . . . . or affect the right, title, ... of the said William Willes, or of the said Charles Bishop of Bath and Wells, or his successors, in or to" three several messuages appendant upon or appurtenant to the canonical

house, or any of them; "but that the same, and every of them, with the appurtenances . . . . shall be, remain, and continue vested in the said William Willes during the term of his natural life, and from and after his decease, in the said Charles Lord Bishop of Bath and Wells, and his successors, in right of the said see, as fully and absolutely, to all intents and purposes, as if this Act had not been made." The proposed investment in land had never been made, and the 700*l.* Consols remained in the names of the bishop, the dean, and the chancellor of the diocese.

The three houses mentioned in the Act had been converted into the four houses to which the summons related.

G. J. Talbot, for the summons. The deed of January 19, 1898, is a "settlement" within the meaning of the Settled Land Act, 1882, and the archdeacon is a "tenant for life" within the meaning of the Act, or he has the powers of a tenant for life under the Act: ss. 2, 38, 58, sub-s. 1 (vi.). The property is granted by the bishop to the archdeacon for his life. The proviso for the cesser of his estate on his ceasing to be archdeacon may be neglected. On the determination of his estate the property reverts to the bishop. He is the reversioner, subject to the archdeacon's life estate. This property is not like a benefice which is vested in the holder as a corporation sole. In that case no conveyance to him by the patron is required. In the present case there must be a conveyance by the bishop to the grantee. In *In re Wilts, Somerset and Weymouth Ry. Co.* (1), some similar property, part of another "rib" in the diocese of Bath and Wells, had been taken by a railway company under their statutory powers, and the purchase-money had been paid into court. The money was claimed by the Ecclesiastical Commissioners as part of the property of the see, and Hall V.-C. refused to admit their claim. (2)

(1) Unreported. Before Hall V.-C. on February 11, 1881.

(2) Hall V.-C. said: "It seems to me to be a just conclusion that the property which is the subject of the present application does not come within the description of property belonging to the bishop of the diocese in right of his see. It is a property peculiarly circumstanced, which, in some way or other, has become subject to assignment from time to time by

NORTH J. 1899 BISHOP OF BATH AND WELLS, *In re.*

In *Ex parte Vicar of Castle Bytham* (1) land had been awarded under an inclosure Act to T. F. M. and his successors, vicars of Castle Bytham, "in full compensation and satisfaction for such of the glebe lands and rights of common respectively of the said vicar as were open and unenclosed at the time of passing the said Act." A railway company had under their statutory powers taken part of the land so awarded, and had paid the purchase-money into court. The vicar asked that part of the money in court might be applied in redeeming some terminable rent charges secured on the glebe lands. It was argued that the land was the subject of a "settlement" within s. 2, sub-s. 1, of the Settled Land Act, 1882. Stirling J. held that there was not a settlement within that sub-section. He held that there was power to grant the application under the joint operation of s. 32 of the Settled Land Act, 1882; s. 69 of the Lands Clauses Consolidation Act, 1845; and the Settled Land Act, 1887; but he declined to exercise in favour of the applicant the discretion conferred by the latter Act. In that case, however, the applicant was the vicar—a corporation sole,

---

the bishop for the time being to some one of the canons of the cathedral church as a residence—not part of the property of the see at all, but devoted to that particular purpose by some founder of the particular charity.

"I think that the interest of the see in the property was nothing more, as regards temporalities, than a quit rent of two shillings a year, which is entered in the steward's book. Probably the property was part of the manor, and therefore the bishop as lord of the manor had such rights as belong to the lord in a tenement which is parcel of the manor and within its ambit. In that sense the see has an interest in it, but it cannot fairly or properly be described as property 'belonging to the see.' It has been granted from time to time in accordance with custom (or as I should rather say what is not merely custom, but what must be taken to be the trust with which the property is clothed in the hands of the bishop) in the peculiar form 'as belonging to the gift and collation of the bishop.' It is true it is 'given, granted and confirmed' unto Frederick Beadon to hold, &c.; but that does not to my mind under the circumstances imply that the bishop was granting the property as parcel of the property of the see properly so described, or as belonging to the see. He was acting in respect of property not belonging to the see, but clothed with some special purpose or trust, whether actually vested in the bishop for the time being for this purpose or not.

"It seems to me, therefore, that the Ecclesiastical Commissioners have not shewn that the property has become vested in them."

(1) [1895] 1 Ch. 348.

and that distinguishes it from the present case. The Settled Land Act is to be construed liberally. It is contrary to its policy that any property should be inalienable: *In re Mundy and Roper's Contract.* (1) If a case falls within the words of the Act (as the present case does), it should be held that the Act applies, when there is no public policy to the contrary.

Edward Ford, for the bishop. In the opinion of the bishop it is desirable from a commercial point of view that the houses should be sold.

Cur. adv. vult.

June 15. NORTH J. This is a very curious and unusual case. The archdeacon and the bishop seem to think it desirable that these houses should be sold and the proceeds of sale invested and the income thereof applied as the rents of the houses would have been applied. Very probably this would be a wise thing to do, and the only question is whether it can legally be done under the Settled Land Act. [His Lordship read the affidavit of Archdeacon Salmon, and referred to the recitals and provisions of the Act of 1779. He read the judgment of Hall V.-C. quoted above, observing that in the present case there did not (as in the case before Hall V.-C.) appear to be a quit rent payable to the bishop in respect of the property. His Lordship continued:—]

There is one passage in Archdeacon Salmon's affidavit which seems to me to be not quite correct, namely, that in which he says that the donee is always "put into possession by livery of seisin, and not by induction, and there has never (so far as can be ascertained) been induction into any of these properties." If he is speaking of an overt induction, such as in the case of a parson appointed to a benefice, very likely he is right. But it is a singular thing, for induction does seem to be the form observed. I find that the document called a "collation". is registered in the registry of the diocese, and there is indorsed on it a certificate of the registrar that "on the 24th day of January, 1898"—that is, five days after the date of the instrument—"the within named E. A. Salmon was duly inducted by

(1) [1899] 1 Ch. 275.

NORTH J. 1899 BISHOP OF BATH AND WELLS, *In re.*

me into the actual corporal possession of the premises." I take it, therefore, that this is the usual form observed, and that there is something called "induction," not a mere operation arising out of the execution of the "collation." In the present case five days after the execution of the deed something was done which is called "induction." I think therefore it must be taken that Archdeacon Salmon was admitted by "induction" in this same sense, though probably not by any overt ceremony. The present application is made by the archdeacon, and he says that the three persons proposed as trustees are willing to act, and that the bishop, as patron or donor of the property, approves of his action in the matter.

As I have already said, it may be a wise step to take, if it can legally be done, but I do not see my way to hold that it can. I do not think the case is one to which the Settled Land Act applies. It is a very peculiar case, as I have said. It is an ecclesiastical matter. The forms adopted from first to last are of this character, which I have described, and what the bishop does he does as patron. He is the person who has the power of nominating the recipient of the rents, and he does that as bishop.

I am not aware of any case in which the Settled Land Act has been applied to ecclesiastical property of this character. No doubt the Settled Land Act is to be construed liberally. I have been referred to the observations of Chitty L.J. in *In re Mundy and Roper's Contract* (1), in which in delivering the judgment of Lindley M.R. and himself, after referring to the broad policy of the Act, as laid down by the House of Lords in *Lord Henry Bruce* v. *Marquess of Ailesbury* (2), he says (3): "The Act of 1882 and the subsequent Acts ought, then, to be construed by the Court with regard to these broad principles and in a spirit of wise and reasonable liberality." On the other hand, as I have already said, I am not aware of any case in which the Settled Land Act has been applied to ecclesiastical property of this kind. In *Ex parte Vicar of Castle Bytham* (4), before Stirling J., the question was whether "an award, under an

(1) [1899] 1 Ch. 275.
(2) [1892] A. C. 356.
(3) [1899] 1 Ch. 289.
(4) [1895] 1 Ch. 348.

Inclosure Act, 'to A. B. and his successors, vicars of X.,' of lands in respect of glebe was an instrument under which 'an estate or interest in land' was 'for the time being limited to or in trust for any persons by way of succession' so as to constitute a 'settlement' within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882." I do not refer to the case as bearing upon the present case, for it has not been contended here that the vesting of the property in the bishop "and his successors" creates a "succession." Stirling J. held that similar words did not. He said that the award did not create a "succession" in any sense by the use of words of limitation. But he made (1) these observations in the course of his judgment, and it seems to me that the view which he took is the right one: "With reference to the question of the jurisdiction of the Court to make any order at all, two arguments have been urged. First of all, it is said that this is settled land within the meaning of the Settled Land Act, 1882, wherein a settlement is defined to be any instrument or instruments under or by virtue of which 'any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession.' Now, this raises a very wide question, because if that contention is well founded, not only would there be jurisdiction in the Court to deal with this money, but, independently of the Court, each successive vicar would have power to deal with the land from which the money has arisen by way of sale or lease in accordance with the Settled Land Acts. This is ecclesiastical land, and by the Statute of Elizabeth (13 Eliz. c. 20) vicars are prohibited from alienating such land, except to a limited extent. The restrictions contained in that statute have been in a certain degree removed in modern times; but in all cases, I believe, alienation cannot take place by an ecclesiastical corporation within the meaning of the Statute of Elizabeth without the consent of the Ecclesiastical Commissioners, and it is difficult to imagine that when the Settled Land Act was passed the Legislature intended to repeal the Act of Elizabeth as to the extent of alienation, or to dispense in such cases with the consent of the commissioners." Stirling J. then went on to deal with the

(1) [1895] 1 Ch. 353.

NORTH J. 1899 BISHOP OF BATH AND WELLS, *In re.*

question whether an award to a vicar and his successors was "a succession." And he said that the words "and his successors" were only words of limitation, "being apt (if not necessary) for the purpose of vesting an estate of inheritance in a corporation sole," and that they did not create a "succession." Now if I were to do that which I am asked to do in the present case—to recognise the right of the archdeacon to have trustees appointed under the Settled Land Act with a view to his subsequently selling this property—I should, it seems to me, be making a precedent which might extend over a very wide area and might lead to the doing of that which I am not aware has yet been done under the Settled Land Act, and which, as Stirling J. pointed out, it would be a strange thing to hold was the effect of that legislation.

Under these circumstances I cannot appoint trustees, for I should be appointing them only for the purpose of doing that which, in my opinion, the archdeacon would not have the power to do after they had been appointed.

G. J. Talbot asked that the costs of the application might be paid out of the 700*l.* Consols.

NORTH J. I do not see how I can do that. I think it is a meritorious application. It was well meant, and if granted might have been to the advantage of the persons interested. But as I think I have no jurisdiction to grant it I do not see how I can order the costs to be paid out of the fund.

Solicitors: *Mead, Daubeny & Williams, for Garrod & Harris, Wells.*

W. L. C.

In re LACY.
ROYAL GENERAL THEATRICAL FUND ASSOCIATION *v.* KYDD.

STIRLING J.
1899
March 24; *May* 17.

[1895 L. 1113.]

Will—Gift to Charity—Freeholds and Leaseholds—Mortmain Act—Possession by Executor—Executor not Express Trustee for Next of Kin—Title of Heir-at-Law and Next of Kin barred by Statute of Limitations—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57)—*Executors Act*, 1830 (11 *Geo.* 4 *and* 1 *Will.* 4, *c.* 40)—*Law of Property Amendment Act*, 1860 (23 & 24 *Vict. c.* 38), *s.* 13.

Spiller v. *Maude*, (1881) 32 Ch. D. 158, n., in which it was held that the Royal General Theatrical Fund Association is a charity, was not overruled or intended to be overruled by *Cunnack* v. *Edwards*, [1896] 2 Ch. 679.

The trusteeship of executors created by the Executors Act, 1830, was not intended to be different in its nature from that which existed previously under the rule established in courts of equity—namely, that in the absence of special circumstances executors were not to be regarded as express trustees.

A testator, who died in 1873, gave all his property charged with certain annuities to the trustees of a charity, and appointed K. to be his executor and gave him a legacy. The estate included freehold and leasehold property. K. entered into possession, and received the income of the testator's estate on behalf of the charity for a period of twenty years. Soon after the testator's death he read over the will to the testator's only son, who was his heir-at-law and sole next of kin, but gave him no information as to his rights under the will, having regard to the gift being to a charity. The son died in 1895 without ever having claimed the estate. In an action by the trustees of the charity for a declaration who was entitled to the testator's estate:—

Held, (1.) that the gift to the charity failed under the Mortmain Act so far as the testator's property consisted of realty or impure personalty; (2.) that K. was not an express trustee for the next of kin, and that the title of the heir-at-law to the freeholds and of the next of kin to the leaseholds was barred by statute.

THOMAS HAILES LACY, by his will dated April 28, 1873, declared as follows: "I bequeath all my property of every description, excepting only the legacies hereafter named, to the trustees of the Royal General Theatrical Fund, of which I am now a director, the capital and total sum of which property is

STIRLING J.

1899

LACY, *In re.* ROYAL GENERAL THEATRICAL FUND ASSOCIATION *v.* KYDD.

to be preserved intact under the name of 'The Lacy Bequest,' but the interest, profits, and rentals of which is to be the property of the said Royal General Theatrical Fund, to be used and disposed of according to the rules of the said fund for its benefit and continuance; but, should the said Royal General Theatrical Fund be dissolved or seriously diverted from its present charitable purpose, then the said capital sum and property forming the 'Lacy bequest' aforesaid shall become the property of the trustees of the Charing Cross Hospital, the interest and produce to be used by them for the good of the said hospital, the principal remaining intact as before stated; and, in the event of the dissolution or removal to a distance of the said Charing Cross Hospital, the above-named 'Lacy bequest' is to revert to the public hospital nearest to 89, Strand, under the same conditions, advantages, and liabilities as above stated, and subject to being forfeited by a similar cause of removal or dissolution in favour of any other hospital that may exist being the nearest to 89, Strand, as aforesaid." He then enumerated the items, fourteen in number, constituting what was described as "property left for the above-named 'Lacy bequest' chargeable to the hereinafter-named bequests, legacies, and annuities." This property included both freehold and leasehold estate. He then appointed Mr. Samuel Kydd, a barrister, of 7, Serjeants' Inn, Temple, to be one of his executors, and bequeathed to him as a compensation for his trouble 250*l.* He then appointed another executor, and bequeathed to him 100*l.* and such manuscripts as might be desirable to enable him to complete a proposed publication; and, after a direction that the money standing to his account with his bankers should be used for the liquidation of any claims against him and for his funeral expenses, he proceeded as follows: "All the above is to be as aforesaid the property in trust for the aforesaid Royal General Theatrical Fund, and to be subject to the following legacies, bequests, and gifts." He then gave some pecuniary legacies and annuities, and concluded: "The last two annuities to be a charge upon my freehold premises, 11 and 13, Garrick Street."

The testator died on August 1, 1873, and his will was proved

on August 30, 1873, by Samuel Kydd alone, the other executor named having renounced probate.

The testator had been married, and had issue one child only, a son named Thomas Lacy, who survived him, and consequently became his heir and sole next of kin. In 1872 Thomas Lacy, the son, became of unsound mind, and was admitted into Bethlehem Hospital, where he remained until March, 1873, when he was discharged. He then went on a voyage to Australia, and was not in this country at the time of his father's death, but returned shortly afterwards.

It appeared from the evidence of Mr. Hughes, Mr. Kydd's clerk, that Thomas Lacy, soon after he returned to England, went to Mr. Kydd, who read over to him his father's will, at the contents of which he was very angry; that he saw him afterwards on several occasions down to 1885, and that neither on the first nor on any subsequent occasion did he shew any symptom of unsoundness of mind.

He had been married in 1872, but was divorced from his wife in 1884. She stated in evidence that when he returned to England he was informed of his father's death, and learned the contents of his will, but that he was not informed and never knew that under the circumstances he was or might be entitled as heir-at-law or next of kin to his father's estate; that he had no professional advice, and that Mr. Kydd never informed him of his rights.

Thomas Lacy died in 1895 in a lunatic asylum without leaving issue and without having made any claim to any part of the property devised by his father's will. Upon the evidence before the Court, however, it was held that he must be taken to have been sound of mind at the time of his father's death. On December 2, 1875, Samuel Kydd executed a document under seal by which he declared that no part of the property, funds, or income of the estate belonged to him, that the whole of the funds, shares, and moneys then at Coutts' Bank in his name were solely the property of the trustees of the Royal General Theatrical Fund for the purposes in the testator's will directed, and to which property, funds, and income he, the said Samuel Kydd, had no right, title, or claim whatever.

STIRLING J. 1899 — LACY, *In re.* ROYAL GENERAL THEATRICAL FUND ASSOCIATION *v.* KYDD.

Samuel Kydd entered into possession of the freehold and leasehold estates of the testator. He granted leases and entered into agreements for leases of them, describing himself in some of those documents as acting for and on behalf of the trustees of the Royal Theatrical fund, and in others as trustee of the Lacy bequest under the will of Thomas Hailes Lacy. He received all the income of the real and personal estate of the testator, and, after paying all outgoings (including the annuities given by the will), paid the surplus into Coutts' Bank to an account entitled "Mr. Samuel Kydd." He from time to time drew sums out of the bank and invested them in his own name. In July, 1891, Kydd, with the acquiescence of the trustees of the Royal Theatrical Fund, transferred these investments and the balance at the bankers into the names of himself and Mr. Leopold de Rothschild; and subsequently the income of the testator's real and personal estate was dealt with in a way similar to that when S. Kydd acted alone. Samuel Kydd died on December 21, 1892. Since his death the income of the real and personal estate of the testator and of the investments had been received by Mr. Hughes, and paid into Coutts' Bank to the account of "Samuel Kydd, deceased, and Leopold de Rothschild."

On May 30, 1895, an originating summons was taken out by the Royal General Theatrical Fund Association and its present trustees against the representatives of Mr. Kydd, Mr. Leopold de Rothschild, and the Charing Cross Hospital for the determination of the question whether the plaintiffs were devisees and residuary legatees of the testator's real and personal estate (subject to the two annuities therein mentioned), absolutely or conditionally, with gifts over. And the summons asked for a declaration of the plaintiffs' rights accordingly. On February 26, 1896, an order was made directing inquiries as to the heir-at-law and next of kin of the testator. Certificates had been made by the master to the effect that Thomas Lacy was the testator's heir-at-law and sole next of kin at the time of the testator's death, but that it had not been ascertained in whom his interest had become vested. Jonathan Potter had, however, become his legal

personal representative, and had been appointed to represent his heir-at-law for the purpose of the determination of the questions arising on the summons. The summons was now argued on the questions whether the heir-at-law and next of kin of the testator became entitled to his real estate and impure personal estate, and, if so, whether any claim on their part was now barred by the operation of the Statutes of Limitation.

Swinfen Eady, *Q.C.*, and *De Witt*, for the plaintiffs. First, we say that this association is not a charity. (1) *Cunnack* v.

(1) The Royal General Theatrical Fund Association was incorporated by Royal charter dated January 29, 1853, its objects, as stated in its rules and regulations, being "to raise by subscriptions from the members thereof, by voluntary donations and bequests from members and others, and by public dinners and theatrical benefits, a stock or fund for making a provision, by way of annuity, for aged and decayed members, and also for funeral expenses, as hereinafter mentioned."

The association was governed by rules enrolled in the Court of Chancery. Rule 9 provided that the subscriptions of members should be made by equal quarterly payments. Rule 10 imposed fines when payments were in arrear, and provided that members whose payments were in arrear for certain specified periods should be struck off the list of members. Rule 12 provided that there should be honorary members, who should make a donation and pay a subscription, but should not be entitled to any benefit from the fund.

Rule 15 provided "that any member of this association who shall have regularly contributed to its funds for the term of seven years shall, at any time afterwards, on becoming incapacitated by accident or infirmity from exercising his or her duties, be entitled to receive such annuity for life as the annual available income of the funds of the association (as set forth in s. 13) shall from year to year afford; such annuity to be, in each case, calculated and apportioned according to the class of subscription which the member shall have adopted and paid."

Rule 18 provided "that no member of class A who shall be in receipt of 120*l.* per annum, of the class B who shall be in receipt of 200*l.* per annum, or of the class C who shall be in the receipt of 250*l.* per annum derivable from whatever property or source, independent of his or her claim on the fund of this association, shall be entitled to an annuity out of such fund."

Rule 19 provided "that the claims of members severally possessing independent annual incomes of less amount than the sums set out in rule 18 shall be so regulated that the annuity payable from the funds of this association, added to the said independent income, shall together amount to a sum not exceeding 120*l.* per annum, to a claimant of class A; not exceeding 200*l.* per annum to a claimant of class B; and not exceeding 250*l.* per annum to a claimant of class C. And that when once the annuity of any claim is settled, no increase shall be made in the amount, although the said annuitant should sell or dispose of the income which he or she was

STIRLING J. 1899 LACY, *In re.* ROYAL GENERAL THEATRICAL FUND ASSOCIATION *v.* KYDD.

Edwards (1), in which Lord Halsbury L.C. throws some doubt upon *Pease* v. *Pattinson* (2) and *Spiller* v. *Maude*. (3) But see *In re Buck*. (4) This association is more like a friendly society. But for rule 18 it could hardly be contended that it is a charity. A person in possession of over 4*l*. a week cannot be said to be poor in the ordinary sense of the word. It is no more a charity than a working-man's club or a benefit society is.

Assuming, however, that the association is a charity, and and that the gift fails on that ground, then we submit that the plaintiffs have obtained through the agency of Samuel Kydd a good possessory title under the Statutes of Limitation.

Beale, Q.C., and *Darlington*, for J. Potter. We submit that this is a gift to a charity, and that the gift having failed the devisees of the real estate are trustees thereof for the heir-at-law: *Patrick* v. *Simpson* (5); *Salter* v. *Cavanagh*. (6) See also Tyssen on Charitable Bequests, p. 464.

S. Kydd went into possession of the real estate under circumstances which suffice to take the case out of the operation of the Statutes of Limitation: *Lyell* v. *Kennedy* (7); *Lawrance* v. *Lord Norreys*. (8)

All the circumstances of the case must be considered to see whether there is such a trust as to prevent the operation of the statute.

In *Read* v. *Fenn* (9) the administrator of an intestate had by mistake appropriated assets, and it was held that the statute was no bar to an action brought against his representative

---

possessed of at the time of becoming a claimant; but if such income shall be lost or diminished through unavoidable misfortune, the annuitant may state the circumstance to the directors, who shall call a special general meeting of the members to consider the case; at which meeting such addition to the original annuity may be made as to the majority of members present may seem just and proper; and any difference of opinion between the parties on any question arising upon this or the preceding rule shall be referred to arbitration, as after provided."

(1) [1896] 2 Ch. 679.
(2) (1886) 32 Ch. D. 154.
(3) 32 Ch. D. 158, n.
(4) [1896] 2 Ch. 727.
(5) (1889) 24 Q. B. D. 128.
(6) (1838) 1 D. & Wal. 668.
(7) (1889) 14 App. Cas. 437.
(8) (1890) 15 App. Cas. 210.
(9) (1866) 35 L. J. (Ch.) 464.

more than twenty years afterwards by the administrator de bonis non.

For the purposes of the statute there is no difference between mistake and fraud: *Brooksbank* v. *Smith.* (1)

In *M'Carthy* v. *Decaix* (2) it was held that an agreement, by one ignorant of his legal rights, to give up a claim to property could not be supported, the person with whom he dealt having kept back from him material information. Further, we submit that owing to the change of the annuities a present right to receive the property does not accrue until the cesser of those annuities. The case as to the personalty rests on a different footing. S. Kydd was an express trustee for the next of kin: 11 Geo. 4, and 1 Will. 4, c. 40; 23 & 24 Vict. c. 38, s. 13. See also Darby and Bosanquet on the Statutes of Limitation, 2nd ed. p. 173, where the question is treated as an open one. Whether under the statute 11 Geo. 4, and 1 Will. 4, c. 40, or under the law before the statute, there was a duty on the executor to hold the property in trust for the next of kin. That duty could not in this case be discharged by merely reading the will to Thomas Lacy.

Jenkins, Q.C., and *Underhill,* for the executors of Samuel Kydd, referred to *Churcher* v. *Martin.* (3)

Butcher, Q.C., and *Austen-Cartmell,* for the trustees of the Charing Cross Hospital. As to the operation of the Statutes of Limitation, we adopt the argument of the plaintiffs.

J. Henderson, for Leopold de Rothschild.

Swinfen Eady, Q.C., in reply. There is a good legal devise of the real estate charged with the payment of the annuities. Assuming that it was bad, the heir-at-law might have brought ejectment immediately on the death of the testator notwithstanding the charge of the annuities. There is no trust for the payment of the annuities, although whoever takes the property must take it subject to the charge. The mere fact of there being a charge would not prevent the heir from re-entering. Both the freeholds and leaseholds are vested in the

(1) (1836) 2 Y. & C. Ex. 58. (2) (1831) 2 Russ. & My. 614.
(3) (1889) 42 Ch. D. 312.

STIRLING J. trustees of the association subject only to the payment of the legacies and annuities: *Willis* v. *Earl Howe*. (1)

1899

LACY *In re.* ROYAL GENERAL THEATRICAL FUND ASSOCIATION *v.* KYDD.

The dictum of Romilly M.R. in *Read* v. *Fenn* (2) was overruled in *In re Johnson*. (3)

The plaintiffs have been in possession either by themselves or through Samuel Kydd since 1873, and all claimants are now barred; there is no express trust on the face of the will.

May 17. STIRLING J. (after stating the facts). The first point is whether the Royal General Theatrical Fund Association is or is not a charity. This turns on the terms of the charter dated January 29, 1853, and the rules therein referred to, particularly rules 15, 18, and 19. It was considered in *Spiller* v. *Maude* (4) by Sir George Jessel M.R., who held that the association was a charity, and with that opinion I respectfully agree. I do not consider that *Spiller* v. *Maude* (4) was overruled or intended to be overruled by *Cunnack* v. *Edwards*. (5)

That being so, the devise and bequest of the testator's property in favour of the charity fails as offending against the provisions of the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), so far as that property consisted of realty or impure personalty; and fails, not only as regards the beneficial interest given to the charity, but as to the legal estate given to the trustees, unless the will creates trusts not of a charitable nature which it is their duty to execute: see *Doe* v. *Wrighte* (6); *Churcher* v. *Martin* (7), compared with *Doe* v. *Harris* (8); *Young* v. *Grove*. (9)

It has therefore to be considered whether the trusts imposed by the will on the trustees of the plaintiff association are purely charitable; or whether they are trustees for the payment of the legacies and annuities subject to which the property is devised. In my opinion the former is the correct view. I

(1) (1880) 43 L. T. 375.
(2) 35 L. J. (Ch.) 464.
(3) (1885) 29 Ch. D. 964.
(4) 32 Ch. D. 158, n.
(5) [1896] 2 Ch. 679.
(6) (1819) 2 B. & Al. 710.
(7) 42 Ch. D. 312.
(8) (1847) 16 M. & W. 517.
(9) (1847) 4 C. B. 668.

think that the trustees of the plaintiff association were meant to take the property of the testator charged with the legacies and annuities; but that the words of the will do not create a trust for the payment of them. The case appears to me to fall within the principle of such decisions as *Cunningham* v. *Foot* (1) and *In re Barker*. (2)

Although the gift fails, the plaintiffs nevertheless contend that they have acquired a title to the property comprised therein under the Statutes of Limitation. Such title is claimed through the acts of Samuel Kydd, and it was contended on behalf of those claiming under Thomas Lacy that Kydd had so conducted himself towards Thomas Lacy that the plaintiffs could not derive any benefit from his acts. I am unable to see upon the evidence that Kydd was under or took upon himself any duty or obligation towards Thomas Lacy which he failed to discharge, or that he was guilty of such misrepresentation or concealment as to constitute a concealed fraud, and in my opinion this contention is not well founded.

I proceed then to consider whether the claim, first, of the heir-at-law of the testator to the freeholds, and, secondly, of the testator's next of kin to the leaseholds, is barred by the statutes.

First, as to freeholds. In these Samuel Kydd took no estate or interest whatever under or by virtue of the will. He, however, entered into and continued in possession and receipt of the rents and profits for more than twenty years to the exclusion of the heir-at-law, and thereby acquired, as it seems to me, a legal title, whether absolute or as agent for the plaintiffs, the trustees, appears immaterial to be considered, for in any event the title of the heir is barred: see 3 & 4 Will. 4, c. 27, s. 34. This is in accordance with the decision in *Churcher* v. *Martin*. (3)

Secondly, as to the leaseholds. These, as regards the possession and receipt of the rents and profits, stand in the same position as the freeholds; but the legal aspect is different in this—that the leaseholds vested in Samuel Kydd as executor.

(1) (1878) 3 App. Cas. 974. (2) [1892] 2 Ch. 491.
(3) 42 Ch. D. 312.

STIRLING J. 1899 LACY, *In re.* ROYAL GENERAL THEATRICAL FUND ASSOCIATION *v.* KYDD.

It was contended that the document of December 2, 1875, was evidence of an assent by him to the bequest of the leaseholds to the plaintiffs, the trustees; but the Charitable Uses Act (9 Geo. 2, c. 36) prohibits the giving, granting, aliening, limiting, transferring, assigning, or appointing of any hereditaments in trust for or for the benefit of any charitable uses otherwise than by deed perfected in the manner prescribed; and it appears to me to be open to doubt whether an assent given by the executor contrary to this prohibition would be effectual to pass the legal title to the legatees or divest it from the executor. The question then arises whether under these circumstances the executor is to be regarded as an express trustee for the next of kin. Now, it was held by the Court of Appeal in *In re Rowe* (1), and again in *In re Davis* (2), that an executor was not an express trustee, so that the claim of a residuary legatee against him was taken out of the operation of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8. In the latter case the present Master of the Rolls says: "An executor was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own, but such a trust does not take a case out of the statute. An executor cannot be deprived of the benefit of the statute by shewing that he is a trustee; it is necessary to make out that he is an express trustee."

Since the passing of the Executors Act, 1830 (11 Geo. 4, and 1 Will. 4, c. 40), the right of an executor to the residue of his testator's estate is governed by the enactment therein contained; and, as is pointed out by Sir George Jessel M.R. in *Stewart* v. *Stewart* (3), the preamble contains an accurate statement of the law as it previously stood. According to that preamble, the executor of a testator who died without making an express disposition of residue became at law entitled to such residue; and Courts of Equity so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appeared to be the testator's intention to exclude them from the beneficial interest therein,

(1) W. N. (1889) 161; 58 L. J. (Ch.) 703.
(2) [1891] 3 Ch. 119, 124.
(3) (1880) 15 Ch. D. 539, 544.

in which case they were held to be trustees for the persons or person entitled to such estate under the Statute of Distributions if the testator had died intestate. It was enacted, "That when any person shall die after the 1st day of September next after the passing of this Act, having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially."

I do not think that the trusteeship created by this Act was intended to be different in its nature from that which existed previously under the rule established in Courts of Equity: and if, prior to the Act, executors were not held to be express trustees, I do not think they ought to be now so held. There is no express decision on the point, but the cases appear to me to shew that (in the absence of special circumstances) executors were not regarded as express trustees. Take, for example, the case of *Bennet* v. *Batchelor* (1), where the testator gave his residuary personal estate to a legatee who died in his lifetime, and appointed executors. It was held that the executors were trustees for the next of kin; but Lord Thurlow L.C. speaks at the commencement of his judgment of the executors being turned into trustees by implication. I may point out that if the residuary legatee had survived, then, according to *In re Rowe* (2) and *In re Davis* (3), the executors would not have been express trustees for him; it would be strange if they were express trustees for the next of kin.

Again, in *Dacre* v. *Patrickson* (4), Kindersley V.-C. says: "Strictly speaking, a trustee cannot have a trust imposed upon him virtute officii as executor. If a trust is imposed upon

(1) (1789) 1 Ves. 63.
(2) W. N. (1889) 161; 58 L. J. (Ch.) 703.
(3) [1891] 3 Ch. 119.
(4) (1860) 1 Dr. & Sm. 182, 185.

STIRLING J.

1899

LACY, *In re.* ROYAL GENERAL THEATRICAL FUND ASSOCIATION *v.* KYDD.

him, it is in another character, namely, that of trustee, whose duty it is to carry out the trust. Quâ executor, he cannot have a trust imposed upon him by the will. The only trust of which he is capable as executor is the trust created by the law for the next of kin."

The opinion of the Vice-Chancellor, therefore, seems to have been that they were trustees by implication of law. In *Stewart* v. *Stewart* (1) Sir G. Jessel, after referring to the preamble, says: "The statute by its recital shews two things: first of all, that the trust is for the persons entitled under the Statute of Distributions; and, secondly, that the executors were held to be trustees for them. Trustees, perhaps, by implication." The view of Sir George Jessel, therefore, seems to have been the same as that of the Vice-Chancellor, although he expresses himself less positively than was usual with him when dealing with a question of law.

I have found no case in which it has been laid down that an executor, who, under such circumstances, does not take the beneficial interest in the residue, is an express trustee.

In the present case, no trusts are expressly imposed on the executor by the will; but (independently of the statute) he would be excluded from the beneficial interest in the residue, not merely by the circumstances of that residue being given to another, but also by that of a legacy being given to him as a compensation for his trouble: see *White* v. *Evans*. (2)

In my opinion Samuel Kydd was not an express trustee for the next of kin of the testator. Consequently the title of the next of kin is barred by the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38, s. 13): see *Willis* v. *Earl Howe* (3) and *In re Johnson*. (4) The cases of *Salter* v. *Cavanagh* (5) and *Patrick* v. *Simpson* (6), which were relied on by the next of kin, do not appear to me to govern the present. Both related to devises of real estate; and in neither did anything depend on the law applicable to executors.

I come to the conclusion, therefore, that neither the heir-at-

(1) 15 Ch. D. 544.
(2) (1798) 4 Ves. 21.
(3) (1880) 29 W. R. 70.
(4) 29 Ch. D. 964.
(5) 1 D. & Wal. 668.
(6) 24 Q. B. D. 128.

law nor the next of kin are now entitled to claim the property in question.

STIRLING J.
1899
LACY, *In re.*
ROYAL GENERAL THEATRICAL FUND ASSOCIATION *v* KYDD.

Solicitors for plaintiffs: *Lumley & Lumley.*
Solicitors for J. Potter: *Field, Roscoe & Co., for Field & Sons, Leamington.*
Solicitor for representatives of S. Kydd: *M. L. B. Braund.*
Solicitors for Charing Cross Hospital: *Fladgate & Co.*
Solicitors for Leopold de Rothschild: *Dawes & Sons.*

G. A. S.

LONDON AND MIDLAND BANK *v.* MITCHELL.

STIRLING J.
1899
June 7, 15.

[1898 L. 2203.]

Limitations, Statutes of—Mortgage of Personal Property—Equitable Mortgage of Shares in a Limited Company to secure Simple Contract Debt—Foreclosure Action after Debt barred.

Where a bank had an equitable charge on shares in a limited company to secure a simple contract debt and after the debt was barred brought an action to enforce their security by foreclosure or sale:—

Held, that the bank were not deprived of their remedy against the property by the fact that the personal remedy for the debt was barred, and that, there being no Statute of Limitations applicable to foreclosure of a mortgage of personal property, the security was enforceable.

THIS was an originating summons by which the plaintiffs sought to enforce by foreclosure or sale an equitable charge on five shares in Joseph Rodgers & Co., Limited. It appeared that two brothers, Alfred and Edward Wordsworth, carried on business in partnership and kept an account first with a banking company now amalgamated with the plaintiff company and subsequently with the plaintiff company. To secure the balance of their banking account Messrs. Wordsworth deposited with the plaintiffs' predecessors the following documents: (1.) Five certificates under the seal of Joseph Rogers & Co. shewing that one Joseph Nelstrop was the owner of the shares in question; (2.) a certificate by the secretary of Joseph Rodgers & Co. of a transfer of these shares by the executors of Joseph Nelstrop to Alfred and Edward Wordsworth; (3.) a

STIRLING J. 1899 LONDON AND MIDLAND BANK v. MITCHELL.

blank transfer of these shares with the name of the transferee in blank signed by Alfred and Edward Wordsworth. The plaintiff company had now become entitled to the benefit of this security. On April 3, 1891, Edward Wordsworth died. William Mitchell was his sole legal personal representative. Alfred Wordsworth was still living. At the date of the death of Edward Wordsworth a considerable balance was due to the plaintiffs on the banking account which was then closed. This balance still remained due. No interest had been paid on it, nor had any acknowledgment been given. On September 28, 1898, more than six years after the death of Edward Wordsworth, this summons was issued against Mitchell and Alfred Wordsworth. Alfred Wordsworth made no objection to the relief claimed, but Mitchell raised the objection that the Statutes of Limitations were a bar to the action.

Upjohn, Q.C., and *Martelli*, for the plaintiffs.

Jenkins, Q.C., and *T. Douglas*, for the defendant Mitchell. The plaintiffs are seeking to enforce an equitable charge on personal property after the debt which it secured has become statute-barred. There is no statute which says that this equitable remedy is barred after six years; but we ask the Court to apply the analogy of the statute of James I., and to hold that if the personal remedy is barred the equitable remedy by way of foreclosure or sale is gone also. There are two analogies on which we rely. The old statutes only barred actions at law, and did not apply to equitable remedies such as suits for foreclosure or sale; but the Court of Chancery applied the analogy of the statute, and although there was no statute which precluded an equitable mortgagee from coming at any time to enforce his security, yet he was held to be barred if the legal remedy was barred: *Hovenden* v. *Lord Annesley* (1); *Cholmondeley* v. *Clinton* (2); Shelford's Real Property Statutes, 9th ed. p. 149. Again, we rely on the analogy of the Statutes of Limitation relating to real property. Thus it has been held that the limitation of twelve years imposed by 3 & 4 Will. 4, c. 27, as amended by 37 & 38 Vict. c. 57, upon actions and suits for the

(1) (1806) 2 Sch. & Lef. 607, 630. (2) (1820) 2 Jac. & W. 1, 139, 141.

recovery of money charged on land applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land: *Sutton* v. *Sutton*. (1) That is the converse of the present case. The analogy of the same statutes has been applied in another class of cases in which it has been sought to enforce a mortgage of a reversionary interest in personal property, and the statute of James has been pleaded and has been held not to apply, inasmuch as under the statutes relating to real estate time would not begin to run until the reversion fell in: *In re Lowes' Settlement* (2); *In re Hancock* (3); *In re Lake's Trusts*. (4) Those cases are distinguishable from the present by the fact of the subject-matter of the mortgage being a reversionary interest. In this Court a mortgage is looked upon as ancillary to the debt, and if the law says that the debt cannot be recovered after six years the security cannot be recovered after that period.

[STIRLING J. referred to *Heath* v. *Pugh*. (5)]

In Robbins on Mortgages, p. 1059, it is suggested that the right of a mortgagee to bring foreclosure in respect of personal property should be deemed to be barred after six years, but it is stated that there is no authority on the point.

Upjohn, Q.C., in reply. It is said that in every case where a debt is barred the right to recover the security is barred, but that question must have frequently arisen in the case of an equitable mortgage of land by deposit of title-deeds, yet it has never been suggested that the mortgage is gone if the debt is barred. There are two further answers to the defendant's argument. In the first place, the statute of James I. merely bars the remedy; it does not extinguish the debt, and because the debt is not extinguished no security or collateral right in respect of the debt is extinguished: *Courtenay* v. *Williams*. (6) Secondly, this is an action in rem to enforce a charge against the property charged; it is an action to extinguish the defendant's right of redemption, and is totally different from an action

(1) (1882) 22 Ch. D. 511.
(2) (1861) 30 Beav. 95.
(3) (1888) 57 L. J. (Ch.) 793.
(4) (1890) 63 L. T. 416.
(5) (1881) 6 Q. B. D. 345; (1882) 7 App. Cas. 235.
(6) (1844) 3 Hare, 539, 551, 552.

STIRLING J. 1899 LONDON AND MIDLAND BANK v. MITCHELL.

for debt. In obedience to what statute can it be said that the remedy in respect of these shares is barred? It is contended that the statute of James I. applies. It is true that that statute relates to personal property, but the Court is not asked to apply that part of the statute, but to apply the part relating to the recovery of debts; and with regard to detinue and trover, the time does not begin to run until some wrong is done to the property in dispute: see Darby and Bosanquet, 2nd ed. pp. 42, 43; but here there is no question of wrongful possession. Then it is suggested that the analogy of the limitations relating to real estate applies; but that proposition has been expressly negatived by Kay J. in *Mellersh* v. *Brown* (1), and there is a good reason for not applying that analogy, because in the case of land the statute not only bars the remedy but extinguishes the right and title. There being no Statute of Limitations which has any application to the right of a mortgagee of personal property to bring an action for foreclosure, the plaintiffs are entitled to the relief they claim.

Cur. adv. vult.

June 15. STIRLING J. (after stating the facts as above). The deposit of the documents above mentioned has constituted the plaintiffs equitable mortgagees of the shares. If authority for this be required, I may refer to what was said by Lord Selborne L.C. in delivering the judgment of the Court of Appeal in *France* v. *Clark*. (2) It was admitted on behalf of the defendant Mitchell that no statute expressly applied; but it was contended that inasmuch as the personal remedy for the debt was barred by the statute 21 Jac. 1, c. 16, s. 3, the remedy against the property which constituted the security for the debt would not be enforced by a Court of Equity acting either in obedience or by way of analogy to the statute. It is now well established that an action for foreclosure is not an action for recovery of a debt, but for recovery of the mortgaged property: *Heath* v. *Pugh* (3); *Harlock* v. *Ashberry*. (4) Before the statute 3 & 4 Will. 4, c. 27, it was held that a mortgagee of land could

(1) (1890) 45 Ch. D. 225.
(2) (1884) 26 Ch. D. 257, 262.
(3) 6 Q. B. D. 345; 7 App. Cas. 235.
(4) (1882) 19 Ch. D. 539.

not get relief by way of foreclosure after a period of twenty years. This period was not fixed because the personal remedy was barred; for the statute of James did not apply to specialty debts, and, as regards simple contract debts, barred them in six years; but it was chosen because s. 1 of that statute (a section now repealed) provided that no person having a right of entry into land should thereunto enter but within twenty years after the title accrued. If the mortgage was not by deed, or if the deed contained no covenant for payment, then, although after six years the personal remedy was barred, the remedy against the land continued. This was recognised in the recent case of *Barnes* v. *Glenton*. (1) That case decided that where an action is brought to recover a simple contract debt, and the money sought to be recovered is charged on land, the period of limitation is that imposed by 21 Jac. 1, c. 16, and has not been enlarged to twelve years by the Real Property Limitation Act, 1874. Romer L.J. says this: "The point is whether the defendant can plead the statute 21 Jac. 1, c. 16, as a defence. Consider how matters stood prior to the statute 3 & 4 Will. 4, c. 27. If an action was brought on a simple contract debt the statute of James could be pleaded. The money sought to be recovered, though charged on land, could not be enforced, against the person who had undertaken to pay it, after the expiration of six years. . . . . There could, therefore, have been a case in which the personal remedy was barred, but not the remedy against the land. That this was the position of things is clear from the cases of *Toplis* v. *Baker* (2) and *Brocklehurst* v. *Jessop*." (3)

In addition to the cases there cited I may refer to *In re Conlan's Estate* (4), where Monroe J. says: "The mere fact that the personal claim cannot be enforced does not deprive the creditor of his remedy against the land." The time, therefore, at which a bar to an action for foreclosure arises under or by analogy to the statute is not that at which the personal remedy ceases, but that at which the remedy against the property which is the subject of the charge is taken away. Now the statute

(1) [1899] 1 Q. B. 885, 890.
(2) (1789) 2 Cox, 118.
(3) (1835) 7 Sim. 438.
(4) (1892) 29 L. R. Ir. 199, 209.

STIRLING J. 1899 LONDON AND MIDLAND BANK v. MITCHELL.

21 Jac. 1, c. 16, s. 3, does apply to certain actions having for their object the recovery of personal property—namely, detinue and trover. It does not appear to me that the analogy founded on these assists the defendant in the present case, for in neither form of action does time begin to run until a defendant has done something wrongful as between him and the plaintiffs as, for example, has refused to comply with a lawful demand or has wrongfully converted property in his possession to his own use: see *Miller* v. *Dell.* (1) Nothing of the kind has happened here.

Another way of looking at the case is this. The deposit of the shares constituted in equity an assignment of them to the plaintiffs to the extent of the debt, just as much as if a formal deed had been executed assigning them to the plaintiffs subject to a proviso for redemption. The plaintiffs have, therefore, acquired in equity an interest in these shares in the nature of property. Though the debt is barred in the sense that a personal action can no longer be brought to recover it, the debt is not gone; nor is the right of property destroyed, for there is no provision in any Statute of Limitations with reference to personal property similar to that contained in 3 & 4 Will. 4, c. 27, s. 34, whereby the title to land is extinguished after the lapse of a certain period. If, then, the property of the plaintiffs still exists, I fail to see what there is to deprive them of the rights attached to such property. On this ground Kay J. proceeded in *In re Hancock* (2), where this very point was raised in argument.

There by an indenture made in 1858 a person entitled to a reversionary interest in personal estate assigned it by way of mortgage to his father. The father died in 1872. The reversion fell in in 1887. No interest had ever been paid on the mortgage debt, and no acknowledgment was ever given by the debtor. The mortgage was sought to be enforced, not by an action for foreclosure, but by an application to the trustees of the property, and it was held that the right was not barred. In the argument it was said: "As between mortgagee and mortgagor the Statute of Limitations is a bar to this claim.

(1) [1891] 1 Q. B. 468. (2) 57 L. J. (Ch.) 793, 794.

Where a mortgagee cannot recover the land he cannot sue on the personal covenant: *Sutton* v. *Sutton* (1); and, conversely, if the mortgagee cannot sue on the personal covenant (as he could not here), his right against the property as between himself and the mortgagor is equally barred."

The learned judge said: "The first question is, whether that right to hold the reversionary interest is barred by the Statute of Limitations. It is not a case of land, and therefore there is no Statute of Limitations which in any way applies to this assignment of a reversionary interest in personal property. The right to recover the personal property only arose on the death of the tenant for life on the 20th of October, 1887. Therefore, if he were now bringing an action against the trustees to recover this reversionary interest, it is quite impossible that the trustees could plead any Statute of Limitations. No Statute of Limitations would apply to the case. In point of fact, the assignee was a cestui que trust of the share assigned, and the trustees could not properly resist the claim by him to hand over the property to him. Therefore the Statute of Limitations, so far as his right to the reversionary share assigned is concerned, is quite out of the question. But then it is said—or at least this is the only way in which the argument could possibly be put, as it seems to me—the debt to secure which this assignment was made is barred, or rather the right to sue to recover the debt is barred; and that, therefore, the mortgagor has some right to recover back the share he has assigned. Is that so? For example, let us try it by the most concrete instance one can put. Suppose the assignee of this reversionary interest in personal property had commenced an action against the trustees, claiming to have the share handed over to him. Of course, he need not make the assignor a party. He has nothing to do but prove his assignment, and the trustees would have had no answer whatever; they must have handed it over. Then could the mortgagor have maintained successfully a suit to prevent their handing it over? On what ground? Suppose he had brought an action, saying, 'True, I did assign this; true, the reversion fell in so lately as October, 1887; but I seek

(1) 22 Ch. D. 511.

STIRLING J. 1899 LONDON AND MIDLAND BANK v. MITCHELL.

to restrain the trustees from handing over the reversion to my assignee, because I say that the debt to secure which I made the assignment is barred.' What Statute of Limitations, or any other statute, would enable him to maintain an action like that? There is no Statute of Limitations which destroys the debt. The Statute of Limitations only destroys the remedy of the creditor. The creditor could not sue the mortgagor upon the covenant, because he would be met by the Statute of Limitations which bars the action. The mortgagee says, 'I do not want to sue anybody; all I want is to have this mortgaged property, which is mine, handed over to me.' How it can be kept from him, I cannot conceive."

That case, no doubt, relates to a reversionary interest in personalty, and it was contended that the decision would have been different if it had related to an interest in possession. If the fund was in the hands of a person who could successfully plead the statute against both mortgagor and mortgagee, no doubt the result would be different; but if the holder of the fund either could not plead the statute (as, for example, by reason of being an express trustee), or did not choose so to do, it seems to me that the reasoning of the learned judge would still apply. How could a mortgagor interfere to prevent the holder of the fund from handing over the property to his mortgagee? In my judgment, the contention of the defendant Mitchell is not well founded, and the plaintiffs are entitled to relief by way of foreclosure or sale. The plaintiffs will add the costs of the summons to their security.

Solicitors: *Morten, Cutler & Co., for Carter, Atkinson & Bentley, Pontefract; Emmet & Co., for Foster, Raper & Routlidge, Pontefract.*

H. B. H

ALDIS *v.* LONDON CORPORATION.

KEKEWICH J.

[1899 A. 488.]

1899

May 12

London City—Streets and Highways—Widening Streets—Compulsory Powers—House—Taking whole—Part only required—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix.*), *s.* 80.

A local authority requiring part of a house for the purpose of widening a street under Michael Angelo Taylor's Act cannot give notice to treat for and take the whole house against the wishes of the owner, unless they prove that the remainder is useless to him; and this is so, even though the removal of the part actually required would destroy the identity of the house, as a house, to such an extent that the owner might have compelled them to take the whole if they had given notice to treat for part only.

MOTION.

This was a motion to restrain the defendants until trial from proceeding upon a notice to treat for the purchase of the plaintiffs' shop and premises, No. 3, Cheapside, E.C.

The defendants had succeeded to the powers and duties of the Commissioners of Sewers of the City of London on and from Plough Monday (i.e. January 10), 1898, by virtue of the City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.).

On January 14, 1896, the Commissioners of Sewers, being about to widen the street called Cheapside under the powers of Michael Angelo Taylor's Act, had made a formal adjudication under s. 80 of that Act adjudging that certain houses, buildings, and tenements including No. 3, Cheapside, projected into, obstructed, and prevented them from widening the said street, and that the possession, occupation, and purchase of such houses, buildings, and tenements and of the land whereon the same stood would be necessary for that purpose.

On March 30, 1897, notice to treat for the whole of No. 3, Cheapside was given in pursuance of such adjudication.

The total ground area of the house was about 700 square feet, 400 of which the defendants proposed to throw into the street. This would leave an irregular area of 300 square feet, being 21½ feet in breadth and 18 to 9½ feet in depth which would not be actually required for the street.

KEKEWICH J.
1899
ALDIS v. LONDON CORPORATION.

The plaintiffs, who were leaseholders with a term of eight and a half years unexpired, filed evidence to shew that with certain alterations they could still carry on the main part of their business on the 300 feet site for the rest of their term, and that they were desirous of so doing. The defendants, who were the owners of the freehold subject to the lease, filed evidence to shew that the identity of the premises would be substantially destroyed, and that the business could not be profitably carried on as proposed.

P. O. Lawrence, Q.C., and *MacSwinney*, for the plaintiffs. The adjudication was unreasonable. As we are willing to sell the part actually required, and are bonâ fide desirous of keeping the rest, the plaintiffs cannot take the whole: *Teulière* v. *Vestry of St. Mary Abbotts, Kensington.* (1)

Warrington, Q.C., and *John Henderson*, for the defendants. The adjudication was bonâ fide and reasonable, at the time it was made. The part actually required for the street forms a substantial portion of the house, and is so indissolubly linked with the fabric, that the identity of the house, as a house, would be destroyed by its removal. Under those circumstances we were obliged to adjudge that the whole house was required, as, if we had given notice to treat for part only, the plaintiffs could have compelled us to take the whole: *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (2); *Gard* v. *London Commissioners of Sewers.* (3) In *Teulière* v. *Vestry of St. Mary Abbotts, Kensington* (1) the greater part of the buildings was not required, and the owners were freeholders. In this case the plaintiffs have only a short term, and it is unreasonable to put the defendants to the expense of reconstruction for that term. The fact that the plaintiffs can still carry on their business there, even if true, is immaterial. The adjudication being bonâ fide and reasonable is conclusive.

No reply was called for.

KEKEWICH J. The ingenious argument on the part of the defendants invites me to determine a question that does not

(1) (1885) 30 Ch. D. 642. (2) [1894] 2 Q. B. 742, 754.
(3) (1885) 28 Ch. D. 486.

arise in this case. They contend with considerable force that if they had determined to take that part of the house which they really want for their improvements, leaving the plaintiffs with a comparatively small and isolated part, the plaintiffs might fairly have said, "You shall not take a large portion of our house and destroy the use of the rest; we are entitled to insist on your taking the whole." That contention is strongly supported by *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1), and particularly by the clear judgment of Collins J. But that is not the question before me. Here the defendants have given notice to take the whole, and the plaintiffs, although they might have acted differently if a different notice had been given, now say, "You are only entitled to take part." I cannot myself see on the facts before me why the plaintiffs are not entitled to say that they will not convey the whole when only part is wanted merely because the tables might have been turned if the defendants had given notice to take part only. I have to deal with the facts as they are. If I thought the plaintiffs were endeavouring to interfere with the defendants' adjudication and trying to keep a useless corner for mere purposes of obstruction I should not support them; but I have definite evidence that they see their way to carry on a lucrative business for the remainder of their lease on the reduced premises. It will be a very small place, but they give instances in their evidence of businesses being carried on in very small places in London and without great disadvantages; and they say, "We wish to have this land, and we can use it." That being so, the defendants' attempt to take the whole by the adjudication is not, in the sense in which those words are used in the cases, "bonâ fide." There is no moral blame attaching to the defendants, and there is no suggestion that they have not done what seemed to them best. In fact, however, they shew by their plans that they only want part, and yet they have adjudged that they require the whole. That, I understand on the authorities, they cannot sustain, unless they prove that the part left would be useless to the plaintiffs; and this they have not done.

(1) [1894] 2 Q. B. 742, 754.

KEKEWICH J. 1899 ALDIS v. LONDON CORPORATION.

Before parting with the case, I may make one remark on *Gordon* v. *Vestry of St. Mary Abbotts, Kensington.* (1) Both the learned judges, and particularly Collins J., took extreme care to decide the construction of the Act without saying how it was to be applied to the particular case, the reason being that they had not the facts before them. Collins J. put it in so many words at the bottom of page 754: "Our decision leaves the question of fact to be decided." Here I have got the facts, and I have to apply the law laid down in that case and in *Teulière* v. *Vestry of St. Mary Abbotts, Kensington* (2), to those facts; and I think that the plaintiffs, seeing their way to use this portion of their own property to advantage, are entitled to retain it, notwithstanding that the other part is required for the improvement of Cheapside. The injunction will go accordingly.

Solicitors: *W. E. Aldis; H. H. Crawford, City Solicitor.*

(1) [1894] 2 Q. B. 742, 754. (2) 30 Ch. D. 642.

G. R. A.

SOUTH AFRICAN BREWERIES, LIMITED *v.* KING.

KEKEWICH J.

1899

June 15, 16, 27.

[1899 S. 175.]

Conflict of Laws—Contract—Local Law applicable—Partial Invalidity under one Local Law—Locus Contractûs—Locus Solutionis—Form—Parties—Intention.

Consideration of the elements material, in case of doubt as to the local law governing a contract, for ascertaining under what local law the parties intended to contract.

Preference should be given, other things being equal, to the law of the place with which the transaction has the most real connection.

The partial invalidity of the contract under one of the local laws possibly applicable thereto is among other circumstances relevant, but not conclusive.

So far as the residence of any party is material, actual and not nominal residence is to be considered.

A contract for the performance of services in the South African Republic, Natal, and elsewhere in South Africa was made in the South African Republic.

The parties were an English company with a registered office, directors, and secretary in England, but carrying on business solely in South Africa, and an English employee resident in the South African Republic.

The contract was in English form, and was modelled on a similar expired contract made in England between the company's predecessors and the employee for the performance of similar services in the South African Republic, and in Natal, or elsewhere. The contract contained a stipulation of doubtful validity under the law of the South African Republic; but both parties were aware of the point, and made and accepted the stipulation for what it was worth:—

Held, applying the principles laid down in *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202, *Jacobs* v. *Crédit Lyonnais*, (1884) 12 Q. B. D. 589, and *In re Missouri Steamship Co.*, (1889) 42 Ch. D. 321, that the contract was intended to be governed by the law of the South African Republic.

WITNESS ACTION.

In this case the plaintiffs, a company whose registered office was in London, claimed an injunction to restrain the defendant from engaging in any brewing business in South Africa within a period of ten years from September 3, 1897, except with the consent in writing of the plaintiffs' board of directors in London.

KEKEWICH J.

1899

SOUTH AFRICAN BREWERIES, LIMITED v. KING.

In 1890 the Natal Brewery Syndicate (South-East Africa), Limited, hereinafter called the syndicate, was incorporated in England, its main purpose being to carry on the business of brewers in the Transvaal, Natal, and elsewhere in South Africa, and its registered office being in London.

By an agreement made in England on October 14, 1892, between the syndicate, which was then carrying on business at Johannesburg in the Transvaal, and at Pietermaritzburg in Natal, and the defendant, a British subject then resident at Nottingham, the defendant agreed to proceed to Johannesburg, and during two years from the date of his arrival to serve the syndicate as brewer or otherwise in their business of brewers carried on at Johannesburg and in Natal or elsewhere at a salary of 300*l.* a year, the agreement being determinable by either party after a certain time as therein mentioned, and the defendant undertaking not to engage in any brewing business in South Africa within five years after the termination of the agreement without the sanction in writing of the syndicate, and further agreeing, in the event of the syndicate being bought or taken over by any other company, to carry out the agreement with such other company.

The defendant arrived in Johannesburg on November 6, 1892, and assumed the management of the syndicate's brewery. Shortly after this the undertaking of the syndicate was taken over by the South African United Breweries, Limited, an English company having its registered office in London.

The defendant served the company under the agreement until its expiration on November 6, 1894, after which he continued to serve them on similar terms at a month's notice.

By an agreement made at Johannesburg on April 11, 1895, between the South African United Breweries, Limited, or its successors, and the defendant, the defendant agreed during the term of five years from October 1, 1894, to serve the company as brewer or otherwise in its business carried on at Johannesburg and in the colony of Natal or elsewhere in South Africa at a salary of 54*l.* 3*s.* 4*d.* per month from October 1, 1894, the company having the right to terminate the agreement at any

time by giving the defendant six months' previous notice in writing, and the defendant agreeing not to engage in any brewing business in South Africa within a period of ten years after the termination of his engagement by the company except with the consent in writing of the board of directors in London.

In May, 1895, the South African United Breweries, Limited, was reconstructed, and its undertaking was taken over by the plaintiffs, another English company with a registered office, directors, and secretary in London.

The defendant thenceforth served the plaintiffs on the terms of the agreement of 1895, and by a memorandum indorsed thereon and dated July 12, 1895, he formally agreed to serve the plaintiffs from that date on the terms of the said agreement as if such agreement had been entered into between himself and the plaintiffs.

The plaintiffs duly determined the defendant's engagement as from September 3, 1897.

The defendant having recently undertaken the management of a brewery at Durban, in the colony of Natal, the plaintiffs commenced the present action to restrain such breach of the restrictive stipulation in the agreement of 1895. The defendant alleging that such stipulation was invalid according to the law of the South African Republic, it became necessary to determine by what law the agreement of 1895 was governed. It was arranged that this point should be first determined, before any evidence as to the law of the South African Republic was obtained.

The defendant gave evidence that he signed the agreement of 1895, notwithstanding his objection to the restrictive stipulation, as he was advised that such stipulation was invalid by the law of the South African Republic, and that he so informed the plaintiffs' agent.

Warrington, Q.C., and *Younger*, for the plaintiffs. The proper law of the contract depends on the intention of the parties, and the whole circumstances must be looked at to discover that intention. In the agreement of 1892 the form of

KEKEWICH J. 1899 SOUTH AFRICAN BREWERIES, LIMITED v. KING.

contract, the place of execution, the parties, and the residences of the parties were all English, and it was clearly intended to be governed by English law. Under the terms of that agreement the defendant could not have engaged in brewing business in South Africa within five years after its determination on November 6, 1894, without the sanction of the plaintiffs' predecessors. He therefore continued in their employment at a month's notice until the agreement of 1895 was entered into. That agreement was obviously modelled on and intended to be a continuation of the agreement of 1892. The parties must have intended the new agreement, which is also in the English form, to be governed by the same law as the old, and not by the several and possibly conflicting laws of the Transvaal, Natal, or other parts of South Africa, rendering the proper law of the contract both indeterminate and uncertain. Again, the fact that the agreement of 1895 contains a stipulation of doubtful validity according to the law of the South African Republic goes far to shew that the parties did not intend that agreement to be governed by that law, whatever it may be: *Hamlyn & Co.* v. *Talisker Distillery*. (1)

Buckmaster, for the defendant. The last argument is disposed of by the defendant's evidence of the circumstances under which the agreement of 1895 was executed.

In considering what law is to govern the contract, the locus contractûs and the locus solutionis are both important facts: *Hamlyn & Co.* v. *Talisker Distillery* (2); *Jacobs* v. *Crédit Lyonnais* (3); *In re Missouri Steamship Co.* (4) In the present case both the locus contractûs and the locus solutionis were in South Africa. Very strong evidence of intention would be required to displace the primâ facie presumption arising from such a combination. Again, although the form of the contract is English, there is no evidence that the Dutch form would have been different.

The argument based on the similarity of the agreement of 1895 to the agreement of 1892, which may or may not have been governed by English law, is untenable, as the agreement

(1) [1894] A. C. 202.
(2) Ibid. 207.
(3) 12 Q. B. D. 589.
(4) 42 Ch. D. 321.

of 1892 had expired some months before the agreement of 1895 was entered into.

Warrington, Q.C., in reply. The presumption arising from the fact that the locus contractûs and the locus solutionis are the same, is not so strong as is contended. In this case there is no determinate lex loci solutionis, as there is no general law of South Africa. The law is summed up in Dicey on the Conflict of Laws, p. 568, r. 149, sub-r. 2: "When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract." In three out of the four illustrations of the sub-rule the form of the contract was treated as an important fact.

Cur. adv. vult.

June 27. KEKEWICH J. The only question now to be decided is whether the meaning and effect of the contract of April 11, 1895, ought to be governed by the law of England or by any other and what law. That question may otherwise be stated in the language of Fry L.J. in *In re Missouri Steamship Co.* (1): "Looking at the subject-matter of this contract, the place where it was made, the contracting parties, and the things to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this contract?" It is to be observed that this mode of stating the question is agreeable to other authorities on the point, and particularly the last of all on which the plaintiffs relied: *Hamlyn & Co.* v. *Talisker Distillery.* (2) I do not propose to recapitulate the facts at length, but some of them must be mentioned. The contract was made at Johannesburg, in the South African Republic, where the South African United Breweries, Limited, predecessors in title of the plaintiffs, were carrying on business, and where the defendant was then residing, he being at that time in the employ of the South African United Breweries. The defendant

(1) 42 Ch. D. 340. (2) [1894] A. C. 202.

KEKEWICH J.

1899

SOUTH AFRICAN BREWERIES, LIMITED v. KING.

thereby agreed to serve the South African United Breweries as brewer, or otherwise, in their business carried on at Johannesburg, and in the colony of Natal, or elsewhere in South Africa. Under this contract the defendant could of course have been required to serve anywhere "in South Africa" (whatever that may mean), but it is common ground that the original agreement of October 14, 1892, made with still earlier predecessors in title of the plaintiffs, contemplated immediate employment at Johannesburg; that from the date of his arrival there he had been engaged as brewer there and not elsewhere; and that on April 11, 1895, it was intended that he should still remain there. In considering by what law the contracting parties intended—or, rather, by which they may justly be presumed to have intended—to bind themselves, it is convenient first to inquire what the contract itself contemplated as the law which was to regulate the contract; and this I conclude to be the view of the present Lord Chancellor expressed in his judgment in *In re Missouri Steamship Co.* (1), from which I have borrowed the phrase just used. He says (2) that, in order to determine whether stipulations are enforceable or not, you must have regard to the law of the contract, "by which I mean the law which the contract itself imports is to be the law governing the contract." I cannot but think that, if this were all, the contract ought to be governed by the law of the South African Republic, where the contract was executed, and where it was intended, though not exclusively, to be performed. That, however, is not all. Many other considerations require attention. Among other things, it is to be noticed that the successive employers of the defendant, including the plaintiffs, were English companies which may be, and often are, stated, though with some inaccuracy of language, to be resident or domiciled in England. The fact cannot be neglected, the residence of the contracting parties always being noticed as an important element in the decision of such a question as arises here; but to attribute a large measure of weight to it in the present case would, I think, be to offend against a ruling of Bowen L.J. in *Jacobs* v. *Crédit Lyonnais*. (3) He is dealing with the argument that the con-

(1) 42 Ch. D. 321. (2) 42 Ch. D. 336. (3) 12 Q. B. D. 601.

tract there under consideration, like that of April 11, 1895, was partly to be performed in one place and partly in another, and he uses this language: "In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties." It is not, in my opinion, according to sound ideas of business, convenience, or sense to say that a company having a registered office with directors and secretary in England, not, however, otherwise carrying on business here, but carrying on business in South Africa, must be treated as resident in England for the purpose of ascertaining whether a contract entered into by them respecting their business in South Africa was intended to be governed by English law or the local law of that part of South Africa. It is to be observed that in *Hamlyn & Co.* v. *Talisker Distillery* (1) the contract was entered into between parties residing in different countries where different systems of law prevailed, and the point is noticed by the Lord Chancellor, Lord Herschell, who moved the judgment of the House of Lords, and by the other learned Lords who took part in the discussion; but there the different residences were real and the parties carried on business where they resided. The form of the contract is, according to the authorities, a more serious matter. Mr. Warrington called my attention to Mr. Dicey's work on Conflict of Laws. The learned author states, on p. 568, under sub-rule 2, the question falling for decision in all these cases, as defined by all the authorities, including *Hamlyn & Co.* v. *Talisker Distillery* (1), and proceeds to give four illustrations. In three out of the four illustrative cases the form of the contract was noticed and was treated as, to some extent at least, influencing the decision; and this is, I think, entirely agreeable to general rules, it being the constant practice on the argument of the construction of contracts—as, for instance, a Scottish settlement dealing with property in England—to regard the form in which the contract is expressed. Here, undoubtedly, the form is English. It may reasonably be said that the expired contract of October 14, 1892,

(1) [1894] A. C. 202.

KEKEWICH J.
1899
SOUTH AFRICAN BREWERIES, LIMITED v. KING.

was taken as a rough draft on which to frame the new contract of April 11, 1895; but, apart from that, the latter contract is not merely in the English language, but follows familiar English forms, and is just such an one as would be entered into between a company carrying on business in England and a person intended to be employed by them. The plaintiffs are entitled to whatever benefit follows from this consideration. Their argument went further than that, and urged that the contract of April 11, 1895, was really a continuation of the former contract, and that, inasmuch as that must be regarded as an English contract, the same character must be attributed to the other. Admitted that the contract of October 14, 1892, was an English contract, which it is unnecessary to determine, I doubt the consequences. That contract had expired, and the defendant, at the date of the contract of April 11, 1895, was serving the South African United Breweries, not under the expired contract, though, I gather, on similar terms as regards wages and the like, but under a temporary agreement abiding only until a new contract could be settled. I think this extension of the argument on the form of the contract fails. Turn now to what, in my mind, is a far more difficult question. It is said that the stipulation which the plaintiffs seek to enforce, though valid according to English law, provided it be reasonably required for the protection of the plaintiffs (a point which has not yet been discussed), is invalid according to the law of the South African Republic; and, therefore, if the latter law be held applicable, stipulations of the contract which the plaintiffs might and do regard as of its essence will fall to the ground, so that in the events which have happened the contract will not be enforceable. It has occurred to me that there may be some difficulty in completely dealing with this part of the case without knowing what is the law of the South African Republic on the subject. The parties have been anxious to avoid the expense and delay incident to inquiries into the foreign law until the question by what law the contract ought to be governed has been decided, and I have desired to assist them as far as possible. The difficulty which I have noticed is not, I think, under the circumstances of this case, insuperable;

but it may appear to others so to be, and I have, therefore, uttered this note of warning. That the inability to enforce a contract according to one system of law will influence the Court in determining whether the contract is to be governed by that law or by some other under which it is enforceable is beyond question. This is recognised in *Hamlyn & Co.* v. *Talisker Distillery* (1), and also, as I read the judgments, in *Jacobs* v. *Crédit Lyonnais* (2) and *In re Missouri Steamship Co.* (3) It seems common sense to hold, if otherwise reasonable, that the plaintiffs intended their contract to prevail and be enforceable, and that stipulations into which they had solemnly entered should not be defeated by the application of one of two systems of law, when the other can, having regard to all the circumstances, be fairly taken to have been intended to govern the contract. The evidence reveals a strange state of facts peculiar to the present case. The defendant has sworn that, after having objected to the stipulation restricting his business engagements on the termination of the proposed contract, he consulted a lawyer in Johannesburg and was advised by him that such stipulation could not be enforced according to the law of the South African Republic; that he told Mr. Mead, the agent of the South African Breweries who signed the contract on their behalf, that he had received this advice, and that then he signed the contract. I do not know whether Mr. Mead took advice or not, or whether he gave credit to the defendant's statement or not; nor, as already mentioned, do I know whether the advice given to the defendant was sound or otherwise; but the strange fact remains that both parties executed the contract knowing that there was a question open on this very point. It may be said, on the one hand, that the plaintiffs' predecessors must have intended to enter into a contract which could be enforced, and, on the other hand, that the defendant never intended to enter into a contract which could be enforced against him in this particular respect. The reasonable conclusion is that they intended to make and accept the stipulation for what it was worth; and I cannot bring myself to think that,

(1) [1894] A. C. 202. (2) 12 Q. B. D. 589.
(3) 42 Ch. D. 321.

KEKEWICH J.

1899

SOUTH AFRICAN BREWERIES, LIMITED v. KING.

under such circumstances, the judgment of the Court on the question whether the contract should be governed by English or other law depends on the possibility or even probability that the restrictive stipulation can be enforced in one event but not in the other. If this be a sound view, the only point clearly in the plaintiffs' favour is that arising on the form of the contract. Ought that, having regard to all the circumstances, to be allowed to outweigh other considerations prevailing in the contrary direction? I have not thought it worth while closely to study any decided cases other than the three cited in argument, which not merely cover the whole ground, but refer to numerous authorities, some more some less bearing on the question under consideration. But I have consulted Mr. Westlake's book on Private International Law. At the date of the publication of the last edition (the 3rd) *Hamlyn & Co.* v. *Talisker Distillery* (1) had not been decided in the House of Lords, and with that before him the learned author may hereafter accept the intention of the parties as a more complete guide than apparently he has hitherto done; but in substance his general statement of the law agrees with the decision in that case and the previous authorities, as also with Mr. Dicey's statement, to which reference has already been made. This is what Mr. Westlake says in s. 212, on p. 258: "It may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such." That seems to me to be as precise and accurate a statement as one can expect to find in any judgment or treatise, having regard to the necessarily infinite variety of facts which require consideration in cases of this character. Can it be doubted that the country with which the transaction here had the most real connection was South Africa, and particularly that part of South Africa which is comprised in the South African Republic? I have already pointed out that the contract was executed there and intended to be performed there;

(1) [1894] A. C. 202.

that the defendant, though an Englishman, had been and was residing in Johannesburg and intended it to be his place of business, and therefore of residence; and that although the other party to the contract was strictly an English company, yet it was there, and not in England, that their business had been and was intended to be carried on. And the stipulation in question has reference to South Africa and not to England, where the defendant is free to carry on business as he pleases. In my opinion the principles of the decided cases and the rules there laid down compel me to hold that this contract was not intended to be governed and is not governed by English law. Then comes the question by what law it ought to be governed. It was certainly intended to be performed, if and when circumstances so required, throughout South Africa, the limitation of which I am not called upon to define. It therefore falls within the class under which the contract may be said to be intended to be performed partly in one place and partly in another. I have found no authority for holding that it might at one time and for some purposes be governed by one law, and at another time and for other purposes by a different law. If bound to select one system of law as that governing the contract, I must select that of the country with which, to repeat Mr. Westlake's phrase, "the transaction has the most real connection," and that is undoubtedly the South African Republic, which for this purpose at least must be treated as an independent sovereign State, just as according to the Constitution of the United States of America the State of Massachusetts was treated in the *Missouri Steamship Case*. (1) I hold the contract to be governed by the law of the South African Republic. The result is that the further trial must be adjourned in order to give the parties the opportunity, until now conveniently deferred, of producing evidence respecting that law.

Solicitors: *Loughborough, Gedge, Nisbet & Drew; H. G. Campion & Co.*

(1) 42 Ch. D. 321.

G. R. A.

BYRNE J.
1899
May 4;
June 1.

In re PRINTERS AND TRANSFERRERS AMALGAMATED TRADES PROTECTION SOCIETY.

[1899 P. 355.]

Trade Union—Dissolution—Unexpended Funds—Resulting Trust.

A society was registered under the Trade Union Acts, 1871 and 1876, to raise funds by means of weekly contributions to defend and support its members in obtaining and maintaining reasonable remuneration for their labour. There were two classes of members—printers and transferrers—and by the rules of the society the printers subscribed twice as much as the transferrers, and were entitled to receive twice as much strike or lock-out pay; the scale of payments also varied with the length of time a member had belonged to the society. No provision was made by the rules for the distribution of the funds of the society on a dissolution. At the time of its dissolution the society consisted of 201 members, and its unexpended funds amounted to 1000*l.*, and the question now arose how this sum was to be distributed. The Attorney-General having been served, and making no claim to the fund as bona vacantia:—

Held, distinguishing *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, on this point, that there was a resulting trust in favour of those who had subscribed to the fund, and that the money was now divisible amongst the existing members at the time of the dissolution, in proportion to the amount contributed by each member to the funds of the society irrespective of fines, or payments made to members in accordance with the rules.

ADJOURNED SUMMONS.

The object of this application was to ascertain how the unexpended funds of a trade union society ought to be distributed on its dissolution.

The Printers and Transferrers Amalgamated Trades Protection Society was registered under the Trade Union Acts, 1871 and 1876, with the object, as stated by its rules, "of raising funds by weekly contributions to defend and support the members thereof in obtaining and maintaining a just and reasonable remuneration for their labour, and shall be under the supreme power of an executive council." The rules provided for the management of the society as a going concern; the only ones material for the purposes of this report were as follows:—

Rule 14 provided that the qualification of members should

be "persons by trade a printer or transferrer." It appeared that the printers were men and the transferrers women.

By rule 15 the entrance fee for each printer was to be 2*s.*, and for each transferrer 1*s.*

Rule 17 provided that the weekly amount of contributions to be paid by the members should be decided by the executive council, "and that for the present it be 4*d.* for each printer, and 2*d.* for the transferrer."

Rule 24 provided that in "persecuted cases" the printer should receive the weekly sum of 15*s.* for himself; if married, 2*s.* for his wife, and 1*s.* for each child under twelve years of age. The transferrer to receive 7*s.* 6*d.* a week; if a widow, to receive at the same rate for her children as the printer.

By rule 37, members on strike or locked out were to be paid as follows:—

Members who have been in the society

	s.	*d.*	
6 months . . .	8	0	per week
12 „ . . .	9	0	„
2 years	10	0	„
3 „	12	0	„

Transferrers to be paid half according to the above scale.

This rule then proceeded to provide a scale for the wives and children of printers and children of transferrers on similar lines. Provision was also made for the payment of fines by members for non-compliance with certain rules; for the investment of all moneys of the society in the names of the trustees in certain specified securities; and for the dissolution of the society with the sanction of four-fifths of its members; but no provision was made for the distribution of any unexpended funds at the time of such dissolution.

The society was registered in July, 1872, and in December, 1898, a resolution for dissolution was duly passed at a general meeting of the society. At the time of this dissolution there were 201 members of the society, and its funds amounted to over 1000*l.*

The plaintiffs, the trustees of the society, now applied by

BYRNE J.
1899
PRINTERS AND TRANSFERRERS AMALGAMATED TRADES PROTECTION SOCIETY, *In re.*

originating summons for the direction of the Court as to the distribution of this fund.

On the summons coming on for argument, Byrne J. directed it to be amended by adding the Attorney-General as a defendant, to see whether he thought fit to claim the fund on behalf of the Crown as bona vacantia; but the plaintiffs' solicitors were subsequently informed by a letter from the Treasury solicitor that the papers had been considered, and that no claim would be made by the Attorney-General, and that it was not proposed that he should be further represented in the proceedings.

The fund consisted of contributions from past and present members, and from fines. Some of the existing members had received payments in accordance with the rules.

Buckmaster, for the plaintiffs, the trustees, stated the facts, but took no part in the argument.

Farwell, Q.C., and *Kirby*, for a defendant representing some of the older members. There being no claim by the Attorney-General, no question of bona vacantia can now arise, and there is a resulting trust in favour of the existing members; but on any distribution regard must be had to the amount paid in by each subscriber, and to the length of time he or she has been a member: the fund can then be divided in proportion to the amounts subscribed. The amounts, if any, paid for fines and sums paid by way of strike pay to any members should be disregarded, as was done in *Cunnack* v. *Edwards*. (1) True, that case was reversed on appeal (2), and it was decided on the special circumstances of that case that there was no resulting trust. The present case is distinguishable on several grounds. In *Cunnack* v. *Edwards* (1) there were no existing members; here there are existing members, and members of quite a recent date. The ground of the decision in *Cunnack* v. *Edwards* (1) on appeal was that each member on making his payments had finally and for ever parted with his interest in the money so subscribed, subject only to providing an annuity for his widow, and the entire beneficial interest had been exhausted in respect of each contributor. Here all existing members have a con-

(1) [1895] 1 Ch. 489. (2) [1896] 2 Ch. 679.

tingent interest in the fund, and the entire beneficial interest is not exhausted.

[BYRNE J. referred to *In re Higginson & Dean.* (1)]

If the Crown made a claim that case might apply; but the Crown does not claim this fund.

Waggett, for a defendant representing the class of printers. The distribution should be in proportion to the amounts subscribed; but on any division the printers ought to receive twice as much as the transferrers. This is in the nature of a voluntary society with no provision in its rules for the distribution of its assets on a dissolution, so that the members for the time being are entitled to divide the fund amongst them equally: *Brown* v. *Dale* (2); but having regard to the fact that the rules provide that the printers shall pay entrance money and subscriptions double in amount to that paid by transferrers, and shall also receive double the amount in lock-out or strike pay, the proper proportion is two shares for a printer to one for each transferrer.

Dunham, for a defendant representing the class of transferrers. All existing members are entitled equally, irrespective of the time they have been subscribers, and irrespective of class or sex. The fund consists of contributions from past, dead, or expelled members, as well as from present members, also of fines; some members have had strike pay and other allowances, others have not, and it would be impossible to inquire into each case; besides, such an inquiry would eat up the fund. As there is consequently no principle upon which the exact proportion for distribution can conveniently be calculated, the fund ought to be divided in equal shares among all the existing members.

Farwell, Q.C., in reply. In *Cunnack* v. *Edwards* (3) Chitty J. decided that fines and annuities to widows need not be taken into account; if that plan is followed, the proportion can be readily ascertained. A distribution in proportion to the amount subscribed by existing members is the fair and proper mode of distributing this fund.

(1) [1899] 1 Q. B. 325. (2) (1878) 9 Ch. D. 78.
(3) [1895] 1 Ch. 489.

BYRNE J.
1899
PRINTERS AND TRANSFERRERS AMALGAMATED TRADES PROTECTION SOCIETY. *In re.*

BYRNE J. I do not think it needful to reserve judgment in this case, as I have heard a very full argument on the subject, which raises a difficult question.

[Having stated the objects of the society and the effect of the rules, which applied only to the society as a going concern, his Lordship continued:—]

The members having duly passed a resolution to dissolve, there is now in the hands of the plaintiffs, the trustees, a fund of about 1000*l.*, which they hold on behalf of the members of the society. Immediately prior to the dissolution, who was interested in the funds of the association? The then members of the association, and no one else; and so long as the society should continue it would be the existing members for the time being who would have this interest; the interest being in the nature of a contingent benefit for such of the members as required payments to be made to them under the rules, or as were entitled to payments under the rules. In *Cunnack* v. *Edwards* (1), a case in a good many respects like the present, the question as to the distribution of unexpended assets arose first of all before Chitty J., and he determined (2) that there was a resulting trust in favour of persons who had been from time to time members of that society, or their legal personal representatives, in shares in proportion to the amounts contributed by each ordinary member to the funds of the society. There is this observation to make about *Cunnack* v. *Edwards* (1): there were at the time of the application no existing members of the association, and the argument really was whether the property in question belonged to the Crown as bona vacantia, or was to be distributed among the representatives of the persons who had contributed to the fund. That state of circumstances does not exist in the present case; here there are existing members. Now, a careful reading of the judgment of the Court of Appeal in *Cunnack* v. *Edwards* (1) points to this as the leading ground of the decision: that, on the true construction of the rules in that case, it was held that each member on making a payment had finally and for ever parted with the whole of his interest in the money he so subscribed in favour of third parties. That

(1) [1896] 2 Ch. 679. (2) [1895] 1 Ch. 489.

does not exist in the present case. The funds provided here are for the benefit of members for the time being; it is true they would not all necessarily take the same amount—some of them might and perhaps did get nothing, some did get a good deal under the rules; but they were all alike entitled to a contingent benefit on the happening of certain events, though the different classes on becoming entitled would receive at different rates.

The present case also differs from *Cunnack* v. *Edwards* (1) in another respect. The advisers of the Crown were by my direction communicated with, and disclaim any interest in this fund, and do not claim it as bona vacantia. Therefore, what I have to consider is, to whom does this fund belong, and how ought it properly to be distributed? I think that the members of the association at the time of the passing of the resolution for dissolution were among them the only persons who can establish a claim to this fund.

Then the next question I have to consider is, ought that fund to be divided among them equally, or ought it to be divided among them in proportion either to payments respectively made by them to the society, or, as it is put on behalf of others, in proportion to the contingent benefits to which they were entitled, that is to say, in the proportion of one and two, or in any other manner? I think practically it reduces itself to this: I must decide that it is divisible among them equally, or divisible among them, as put by Mr. Farwell on behalf of the class whom he represents, in proportion to their contribution to the funds of the society. Now, the true principle I think is to be found in this—that there is a resulting trust in favour of those who have contributed to these funds, and I think that the proper and legitimate way of dividing, therefore, will be in accordance with the amounts contributed by the existing members at the time of the passing of the resolution. If I were to carry out the strict rights to the fullest extent, I might have to direct an account as to fines and forfeitures and payments made. But, as in the case of *Cunnack* v. *Edwards* (2), Chitty J. thought himself entitled to disregard the amounts

(1) [1896] 2 Ch. 679. (2) [1895] 1 Ch. 489.

BYRNE J. 1899 PRINTERS AND TRANSFERRERS AMALGAMATED TRADES PROTECTION SOCIETY. *In re.*

paid for fines or forfeitures and annuities received by widows in taking the account, on the ground of the expense, loss, and delay that would thereby be occasioned; so in the present case I think I am justified also in saying those amounts need not be taken into account in ascertaining the proportions in which this fund is to be distributed.

Solicitors: *Carthew & Wheeler, for Arthur Ellis, Burslem.*

W. C. D.

BYRNE J. 1899 *June* 16.

JOHNSTONE *v.* CROMPTON & CO.

[1899 J. 804.]

Mines and Minerals—Reservation from Grant—Redrock and Coal neither having any Commercial Value—Injunction.

The defendants were the lessees of certain lands under a lease dated September 30, 1860, granted by the predecessor in title of the plaintiff.

The lease contained the following reservation: "Except nevertheless and always reserved out of this demise all mines and minerals within or under the said land."

The defendants had, for the purpose of obtaining water, commenced to construct a borehole eighteen inches in diameter, and had already bored through a stratum of redrock and a layer of coal from six to eight inches in thickness:—

Held, that although the substances in question could not (as was admitted) be worked at a profit at the present time, they fell within the reservation in the lease as being substances which had "a use and a value of their own independent of and separable from the rest of the soil," and that the plaintiffs were entitled to an injunction to restrain the defendants from boring or removing any mines or minerals in or under the land.

Hext v. *Gill*, (1872) L. R. 7 Ch. 699, *Earl of Jersey* v. *Neath Union*, (1889) 22 Q. B. D. 555, and *Lord Provost and Magistrates of Glasgow* v. *Farie*, (1888) 13 App. Cas. 657, examined and explained.

MOTION to restrain the defendants from making or permitting to be made in or under the lands demised by or comprised in an indenture of lease dated September 30, 1860, any excavations or underground borings, or from removing any mines or minerals in or under the said lands, or from interfering with the use and enjoyment by the plaintiffs of the said mines or minerals.

By an indenture of lease dated September 30, 1860, and made between Thomas, Earl of Wilton (the predecessor in title of the plaintiff Sir Frederic Johnstone) of the one part, and Thomas Mucklow (through whom the defendants claimed) of the other part, three closes, fields, or parcels of land situate in the township of Ainsworth, forming part of the Heaton estates, together with the printworks, dyehouse, bleachworks, messuage, dwelling-house, erections and buildings thereon, and the reservoirs of water situate thereon, and the use and enjoyment of all water usually flowing on to the lands thereby demised from the adjoining lands of the said Earl, with their appurtenances, "except nevertheless and always reserved out of this demise all mines and minerals within or under the said land with liberty for the said Earl and his assigns and other the person and persons for the time being entitled to the reversion immediately expectant on the determination of the term hereby created and their agents and workmen at all times to drain, get and dispose of the said mines and minerals at his and their free will and pleasure nevertheless not breaking open nor doing any damage to the surface of the land hereby demised or the buildings thereon and making reasonable compensation to the said lessee his executors administrators or assigns or his or their tenants for all damage thereby occasioned," were demised by the said Earl to the said Thomas Mucklow for the term of ninety-nine years, from September 29, 1860, without impeachment of waste at the yearly rent of 150*l*., and subject to the covenants by the lessee and conditions therein contained.

By an indenture of lease, dated March 17, 1896, and made between the then Earl of Wilton of the one part and Thomas Fletcher of the other part, all those mines of coal and cannel known by the names of the "Trencherbone" and the "Cannel" mines, lying under parts of the Heaton estate, together with full liberty to work, win, and get the said mines, were demised to the said Thomas Fletcher for the term of twenty-one years from March 25, 1896, subject to the payment of the dead rent and royalties therein mentioned.

The mines demised by the lease of March 17, 1896, comprised mines known as the "Trencherbone" and "Cannel" mines

BYRNE J. 1899 JOHNSTONE v. CROMPTON & Co.

lying under the lands demised by the lease of September 30, 1860.

The lease of September 30, 1860, was assigned to the defendants Crompton & Co. in or about the year 1897. The lease of March 17, 1896, was assigned to the plaintiff company, Thomas Fletcher & Sons, Limited, on May 16, 1898.

It appeared from the evidence that the defendants had recently commenced to excavate and sink a borehole about eighteen inches in diameter in and through the mines and minerals reserved by the lease of 1860, and that they intended to sink the said borehole to a depth of about 400 feet, so as to ensure their piercing the rock known as "cannel rock" lying immediately above the cannel mines, and obtaining water therefrom. It appeared that in order to reach the cannel rock the borehole must pass through the following strata, namely, surface clay, redrock, red metal, fireclay, coal, and Trencherbone coal, and that the defendants had already bored through the red rock and a stratum of coal from six to eight inches in thickness. It also appeared that the cannel rock contained large quantities of water which, when reached by the borehole, would through pressure rise to the surface, and in so doing would flood all the strata above it which were pervious to water, including the Trencherbone coal and Trencherbone rock, and that the consequence of such flooding would inevitably be that when the coal above the cannel rock was worked, the workings would become flooded, and that the flooding would extend through all the connections made or to be made with those workings, and that irreparable injury would be done, not only to the mines and minerals under the lands demised by the lease of September 30, 1860, but to the adjoining mines.

The main question was whether, having regard to the reservation in the lease of 1860, the boring through the strata of redrock and coal, of from six to eight inches in thickness, was a boring through, and, therefore, a trespass upon, the reserved minerals.

It was conceded that the redrock and coal in question could not be commercially worked to a profit at the present time.

Farwell, Q.C., and *Cann*, for the plaintiffs. The principle laid down in *Hext* v. *Gill* (1), we submit, governs the present case. The redrock and the coal through which the defendants have already bored, though they cannot now be worked at a profit, are substances which can be got from underneath the surface of the earth for the purpose of profit, and therefore fall within the reservation as being minerals. The definition given in the judgment of Mellish L.J. in that case has not been affected by the judgments in the House of Lords in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie*. (2) The test is, not whether the minerals could be worked at a market profit at the time, but whether they had a use and a value of their own independent of and separable from the rest of the soil: *Earl of Jersey* v. *Neath Union*. (3) We submit that we are entitled to the injunction as asked.

MacSwinney, and *H. P. Lowe*, for the defendants. Doubt has been thrown on the accuracy of the definition in *Hext* v. *Gill* (1) by the House of Lords in *Lord Provost and Magistrates of Glasgow* v. *Farie*. (2) The reservation in the lease of 1860 can only be held to apply to minerals which can be worked at a profit, and cannot apply to these thin layers of redrock and coal. This is clear on reference to the proviso giving liberty to the Earl and his assigns at all times to drain, get, and dispose of the mines and minerals at his and their free will and pleasure, nevertheless not breaking open nor doing any damage to the surface of the land. This proviso tends to shew that the reservation cannot have been intended to include the strata in question lying under the surface. We submit that we are not committing a trespass, and that we are entitled to continue the boring.

[They also referred to *Nisbet Hamilton* v. *North British Ry. Co.* (4) and *Midland Ry. Co.* v. *Robinson*. (5)]

Farwell, Q.C., in reply.

BYRNE J. In this case the plaintiffs seek for an injunction to restrain the defendants from boring beneath the surface of

(1) L. R. 7 Ch. 699.
(2) 13 App. Cas. 657.
(3) 22 Q. B. D. 555.
(4) (1886) 13 R. 454.
(5) (1889) 15 App. Cas. 19.

BYRNE J. 1899. JOHNSTONE v. CROMPTON & CO.

certain property which is demised to them, the object of the boring being to obtain water. On the evidence as it at present stands water cannot be obtained without boring to such a depth as to penetrate the cannel coal, which lies at a very considerable depth from the surface. The defendants are lessees under a lease dated September 30, 1860, whereby certain lands were demised [his Lordship read the lease as above set out, and proceeded:—] Now it is in evidence that there is danger should the cannel coal be penetrated, or should a seam called the "Trencherbone coal" be penetrated and water be subsequently obtained of very considerable flooding of other property belonging to the plaintiffs, which would be the consequence of the operations which have been commenced. I have before me a plan shewing the nature of the material through which the boring has gone and will have to go should it be continued. There is first of all the surface clay, then next to that comes redrock and red metal, then coal six to eight inches, then bands of coal, then metal, and below that again redrock porous, then thin coal, and then the Trencherbone coal; then below that again there is redrock and metal, and then thin bands of coal; and ultimately, at a very considerable depth, you get to cannel coal. At present the defendants have only bored to the six- to eight-inch coal—that is the highest near the surface. They have bored through the redrock.

The question which has been argued before me is whether, having regard to the reservation in the lease, the boring through the redrock and the coal is boring through, and therefore a trespass upon, the reserved mines and minerals or rather the reserved minerals. It is conceded that this redrock and the coal in question cannot be commercially worked to a profit at the present time.

It is said, on the other hand, by the defendants, that the true meaning of the reservation is only to reserve such minerals as can be worked for a commercial profit. It is also said that, assuming the redrock and the coal in question can be construed to come within the term minerals in the reservation, nevertheless there is such a context as would render it necessary to put such a construction on that reservation as to shew that in

this particular document it referred only to such minerals as can be got at a profit. That is founded on the expression "with liberty at all times to drain get and dispose of the said mines and minerals at his and their free will and pleasure nevertheless not breaking open nor doing any damage," and so on, in the words I have already read.

I had better deal with that point first. I do not think, on a fair construction of this reservation, if without that power the clause in question includes such substances as are said to be minerals in the present case, that the use of the subsequent words giving power to drain, get, and dispose of would limit the use of the word "minerals" in the way suggested. Therefore, it occurs to me that the true question is whether a reservation of mines and minerals refers only to substances properly coming within those words which can be commercially worked to a profit.

Now, the first case to which I propose to refer is, and has been for many years regarded as, a leading case on this branch of the law—I mean *Hext* v. *Gill* (1)—and, without going into the circumstances of that case, I refer at once to a passage in the judgment where Mellish L.J. says (2): "But the result of the authorities, without going through them, appears to be this: that a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." Then the learned judge proceeds to consider whether it ought to have a more limited meaning in the case then before him.

In the case of *Lord Provost and Magistrates of Glasgow* v. *Farie* (3), a question arose as to the meaning within the Waterworks Clauses Act, 1847, of a reservation of the "whole coal and other minerals in the land," in terms of the Waterworks Act, 1847. The words in s. 18 of the Act being "any mines of coal ironstone slate or other minerals &c.," and there was some discussion as to the true meaning of *Hext* v. *Gill* (1)

(1) L. R. 7 Ch. 699. (2) L. R. 7 Ch. 712.
(3) 13 App. Cas. 657.

BYRNE J.
1899
JOHNSTONE v. CROMPTON & Co.

in the course of that case. Lord Halsbury L.C. says (1): "I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by James L.J., in the case of *Hext* v. *Gill* (2), which I shall have occasion hereafter to refer to, and although the Lord Justice held himself bound by authority so that he yielded to the technical sense which had been attributed to those words I still think (to use his language) that a grant of 'mines and minerals' is a question of fact 'what these words meant in the vernacular of the mining world, the commercial world, and landowners,' at the time when they were used in the instrument"; and later on he refers to the language of Mellish L.J. in *Hext* v. *Gill*. (2) He refers to the summing-up of the authorities, and then he says: "I cannot myself assent to such a definition. In the first place it introduces as one element the circumstance that the substance can be got at a profit. It is obvious to see that if that is an essential part of the definition the question whether a particular substance is or is not a mineral may depend on the state of the market, and it may be that a mineral one year is not a mineral the next." Then Lord Macnaghten says (3): "In some of the reported cases it seems to be laid down, or assumed, that to be a mineral a thing must be of commercial value, or workable at a profit. But it is difficult to see why commercial value should be a test, or why that which is a mineral when commercially valuable should cease to be a mineral when it cannot be worked at a profit." Lord Herschell says (4): "I think the reservation must be taken to extend to all such bodies of mineral substances, lying together in seams, beds or strata, as are commonly worked for profit, and have a value independent of the surface of the land."

The observations of the learned Lords in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie* (5) were fully considered in the case of *Earl of Jersey* v. *Neath Union*. (6) I will venture to take from the judgment of Bowen L.J. his view of what was meant by the summing-up of Mellish L.J. of the

(1) 13 App. Cas. 669.
(2) L. R. 7 Ch. 699.
(3) 13 App. Cas. 689.
(4) 13 App. Cas. 685.
(5) Ibid. 657.
(6) 22 Q. B. D. 555.

authorities in *Hext* v. *Gill* (1), and he deals with that matter in reference to the criticism of Lord Halsbury L.C., to which I have already referred in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie*. (2) The passage I refer to is at p. 562, where the Lord Justice says: "I would only say with regard to Lord Halsbury's criticisms on *Hext* v. *Gill* (1), I cannot help thinking either that he has not been perfectly reported, or else the Lord Chancellor had not in his mind at the moment the exact canon of construction of Mellish L.J., because Mellish L.J. does not say, nor, I think, mean, that the test was whether the minerals could be worked at a market profit at the time, but whether they had a use and a value of their own independent of and separable from the rest of the soil."

Reading the passage from the judgment of Mellish L.J. to which I have referred together with what Bowen L.J. said in the passage I last read, it does not appear to me that as interpreted by Bowen L.J. there is anything in the law as laid down in *Hext* v. *Gill* (1) open to the criticism which was applied to it. The case of *Earl of Jersey* v. *Neath Union* (3) is a clear decision, if it were wanted, that *Hext* v. *Gill* (1) is a binding authority, not only on me, but on the Court of Appeal; so also is the case of *Earl of Jersey* v. *Neath Union*. (3)

Now, the question is, What is the true meaning of the rule as laid down in *Hext* v. *Gill* (1)? It cannot be that the test is whether the minerals can be worked at a market profit at the time. This is expressly shewn by Bowen L.J. not to be the meaning of the words of Mellish L.J. Does it, then, mean that the test is whether they are minerals in any other sense than this: are they substances otherwise falling under the definition of minerals which have "a use and a value of their own independent of and separable from the rest of the soil"? I understand the true rule to be this: you inquire what the substances are; and then you ask, Are these "minerals" in the sense that they form or belong to a class or kind of substances of which it can be said that when separated from the soil they are valuable either for the purposes of sale or for other purposes? Applying that test

(1) L. R. 7 Ch. 699. (2) 13 App. Cas. 657.
(3) 22 Q. B. D. 555.

BYRNE J. 1899 JOHNSTONE v. CROMPTON & Co.

to a simple substance like coal, I ask myself, Is coal a mineral? Speaking generally, undoubtedly, apart from this particular test of value, one must say that coal is one of the most familiar examples of what is meant by minerals, not merely in a general sense, but in a grant of this description. It is one of the first things which is so regarded in a coal district. Am I to inquire whether the coal as it now exists beneath the soil can be got so as to be sold at a profit? I think not. I think it is a substance which has, when separated from the soil, a use and a value of its own independent of and separable from the rest of the soil: and that this is the proper test to apply. I think that is the fair result of the authorities; and that in this case, it being shewn upon the evidence that red rock is useful for building purposes, as to the redrock and as to the coal which have been referred to, although neither of these substances can be worked to a commercial profit at the present time, yet nevertheless they fall within the reservation, and that what the defendants have done and are threatening to do constitutes really a trespass on the property of the plaintiffs in the action. The result, therefore, is that the plaintiffs are entitled to an injunction restraining the defendants from trespassing on the mines and minerals mentioned in the lease.

Solicitors: *W. F. Foster; Woodcock, Ryland & Parker.*

G. M.

HARTLEY *v.* MADDOCKS.

COZENS-HARDY J.

[1898 H. 1051.]

1899

May 10, 11, 16.

Grant of Land subject to Rent-charge—Grant or Reservation—Eviction of Grantee from Part of Land—Apportionment of Rent-charge—Acreage or Value.

In 1840 A. by deed granted to B. certain land to the use that A. and his heirs should for ever receive thereout a certain rent-charge, "and subject and charged as aforesaid" to dower uses in favour of B.; and by the same deed B. granted to A. in fee the same rent-charge out of the land thereby granted. In 1898 B.'s successors in title were evicted from part of the land by title paramount, and thereupon claimed an apportionment of the rent-charge; but A.'s successor in title contended that the rent-charge was payable in full out of the remainder of the land:—

Held, that the deed operated as a reservation of the rent-charge in the first instance to A. in fee; that the subsequent grant by B. to A. in fee of the same rent-charge was inoperative; and that the rent-charge must be apportioned according to the value of the land.

By indenture of feoffment dated September 29, 1840, and made between G. Bramwell of the first part, J. Bailey of the second part, and T. Mycock of the third part, it was witnessed that, "in consideration of the rent thereinafter reserved and limited in use and of the covenants thereinafter contained on the part of the said J. Bailey," the said G. Bramwell did grant, bargain, sell, enfeoff and confirm unto J. Bailey and his heirs certain land at Stockport, to hold the same unto said J. Bailey his heirs and assigns "to the use, intent and purpose that the said G. Bramwell, his heirs and assigns should for ever thereafter receive and take thereout one clear annual rent of 12*l.* 1*s.* 2½*d.*," to be payable half-yearly as therein mentioned, with the usual powers of entry and distress if the rent was unpaid for twenty days, "and subject to and charged as aforesaid" to dower uses in favour of the said J. Bailey in fee simple; and it was further witnessed that "for the considerations aforesaid" the said J. Bailey did grant to the said G. Bramwell his heirs and assigns "the clear yearly rent of 12*l.* 1*s.* 2½*d.* thereinbefore mentioned to be issuing out of and payable from the said land." The deed also contained a

COZENS-HARDY J.

1899

HARTLEY v. MADDOCKS.

covenant by the said J. Bailey with the said G. Bramwell "to pay the said rent of 12*l.* 1*s.* 2½*d.* in manner aforesaid."

On February 24, 1898, the plaintiffs, who were the successors in title of the said J. Bailey, were evicted by title paramount from a portion of the land granted by the deed of feoffment, it appearing that that portion had, at the date of feoffment, been held by G. Bramwell for the residue of a long term of years which expired in November, 1897. On February 26, 1898, the defendant, who was the successor in title of G. Bramwell, distrained on the remaining portion of the land for the whole of the rent-charge. Thereupon the plaintiffs brought this action claiming damages for an excessive distraint, and an apportionment of the said rent-charge.

It was stated that the deed was a common form in the north of England, where rent-charges were created.

Methold, for the plaintiffs. This is a freehold rent, and the question is whether such a rent is apportionable at law. There is no decision upon the point; but in Coke upon Littleton, vol. i., s. 222 (148 *b*), there is this passage:—

"Concerning the apportionment of rents, there is a difference betweene a grant of a rent, and a reservation of a rent: for if a man be seised of two acres of land, of one in fee simple, and of another in taile, and by his deed grant a rent out of both in fee, in taile, for life, &c., and dieth, the land intailed is discharged, and the land in fee simple remaines charged with the whole rent: for against his owne grant he shall not take advantage of the weakenesse of his owne estate in part. But if he make a gift in taile, a lease for life or for yeares of both acres, reserving a rent, the donor or lessor dieth, the issue in taile avoydeth the gift or lease, the rent shall be apportioned; for seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, that the donee or lessee should not be charged with the whole rent, but that it should be apportioned rateably according to the value of the land, as Littleton here saith."

And a little further down—

"If the king give two acres of land of equall value to another

in fee, fee taile, for life or yeares, reserving a rent of two shillings, and the one acre is evicted by a title paramount, the rent shall be apportioned."

It is submitted that the deed here operated as a reservation of the rent-charge, and that there must be an apportionment.

Hugo Young, *Q.C.*, and *O. L. Clare*, for the defendant. In this case there was no reservation of the rent-charge, and therefore the passage cited from Coke does not apply. At the date of the deed Bramwell was seised of part of the land in fee and of part for a long term of years. In such a case Coke says, s. 221 (147 *b*) :—

"If a man seised of lands in fee, and possessed of a terme for many yeares, grant a rent out of both for life in taile or in fee, with clause of distresse out of both, this rent being a freehold doth issue onely out of the freehold, and the lands in lease are onely charged with a distresse."

That is the position here. The rent-charge is really charged on the freehold portion of the land, and the power of distress was given over the leaseholds also only to increase the security for the rent-charge.

Also in s. 222 (148 *b*), Coke says :—

"If a man grant a rent-charge out of two acres, and after the grantee recovereth one of the acres against the grantor by a title paramount, the whole rent shall issue out of the other acre."

Further, the rent-charge here is created by a limitation under the Statute of Uses, not reserved, and subject to that limitation Bailey takes the fee. His estate follows that limitation, and then he out of his new estate grants the rent-charge to Bramwell by way of further security. It is a grant of which Bailey takes the responsibility, and it is his title that has failed. There can be, therefore, no apportionment.

[They also referred to Davidson's Conv. 4th ed. vol. ii., part 1, prec. 77; *Butt's Case* (1); and Burton's Compendium, 7th ed. p. 349.]

Method, in reply. Coke was writing after the Statute of Uses had been passed. His remarks therefore must be taken to

(1) 7 Rep. 23 a.

COZENS-HARDY J.

1899

HARTLEY v. MADDOCKS.

apply whatever form the document takes. It is immaterial in this case that Bramwell was only possessed of a term of years in part of the land, because the grant was a feoffment made before 1845, and therefore must, as between the parties to it, be construed as a grant of the fee. The apportionment ought to be according to the acreage.

Cur. adv. vult.

May 16. COZENS-HARDY J., after stating the facts, continued:—Under these circumstances the question which arises for my decision is whether the rent-charge ought to be apportioned, or whether it still continues to be payable in full, although the persons claiming through the purchaser have been deprived of part of the land. In my opinion this is a case in which the rent is apportionable. In Coke on Littleton, s. 222, 148 *b*), a distinction is drawn between the grant of a rent and the reservation of a rent, it being pointed out that in the former case the rent will continue payable notwithstanding that the grantor may not have a title to the whole of the land, "for against his owne grant he shall not take advantage of the weakenesse of his owne estate in part," but in the latter case "seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, that the donee or lessee should not be charged with the whole rent, but that it should be apportioned rateably according to the value of the land." And a little further down Coke says, "if the king give two acres of land of equall value to another in fee . . . . reserving a rent . . . . and the one acre is evicted by a title paramount, the rent shall be apportioned." It was argued that the doctrine thus laid down by Coke applies only where the rent is strictly reserved, and not to a case where the rent is created by means of a limitation taking effect under the Statute of Uses. I think, however, this is too narrow a view. On the face of the deed of 1840 the rent is treated as "reserved or limited in use." The rights of the parties ought not to depend upon the mode in which that which in effect is a reserved rent-charge was created. It took effect out of Bramwell's estate in fee by virtue of his own assurance, and Bailey took nothing except

subject to and charged with the rent. It was further urged that the second witnessing part operated as a grant by Bailey, so that the passage quoted from Coke was really an authority against the apportionment. I am unable, however, to give any meaning or effect to this second witnessing part. The rent-charge was prior to Bailey's estate in fee. Bramwell already had that rent-charge, not by virtue of any grant from Bailey, but by means of Bramwell's own conveyance to uses. It was absurd for Bailey, "for the considerations aforesaid," to grant that which was already vested in Bramwell. The result is, that in my opinion the rent must be apportioned. I understand that the parties have agreed or will agree upon the figures; but I may state that in my view the apportionment ought to be, not according to acreage, but according to the respective values of the properties at the date of the eviction. The defendant must pay the costs of the action.

Solicitors for plaintiffs: *A. H. Arnould & Son, for Sutton, Elliott & Co., Manchester.*

Solicitor for defendant: *H. Maddocks, Coventry.*

H. L. F.

WRIGHT J.

1899
May 31.

In re 1897 JUBILEE SITES SYNDICATE.

Company—Winding-up—Petition by Official Receiver—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *ss.* 8, 14.

It is not a matter of course to make a compulsory winding-up order under s. 14 of the Companies (Winding-up) Act, 1890, but the section applies to every case where the official receiver after such an order would possess any power which the voluntary liquidator cannot exercise and which is necessary in order that there may be an efficient winding-up in the interests of the creditors or contributories—e.g., where misfeasance proceedings are contemplated and a public examination is absolutely necessary in order to obtain a sufficient disclosure as to the facts.

THE 1897 Jubilee Sites Syndicate, Limited, was incorporated in April, 1897. On November 2, 1897, it went into voluntary liquidation, and on November 10, 1897, an order was made continuing the voluntary winding-up under the supervision of the Court, H. C. Wilson, the voluntary liquidator and late auditor of the company, being continued as liquidator. H. Spain was afterwards appointed by the Court as an additional liquidator. The senior official receiver petitioned for a compulsory winding-up order against the company under s. 14 of the Companies (Winding-up) Act, 1890, which is as follows: "Where a company is being wound up voluntarily or subject to the supervision of the Court, the official receiver attached to the Court having jurisdiction to wind up the company may present a petition that the company be wound up by the Court, and thereupon, if the Court is satisfied that the voluntary winding-up or winding-up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories, it may make an order that the company be wound up by the Court." It was stated that the company was promoted by the Barberton Development Syndicate, Limited, a company registered in Scotland, which was alleged to be in reality Edward Beall, solicitor. The petitioner also alleged that a certain agreement with one Bradley was fraudulent, that the existence of Bradley was at least doubtful, and a number of other facts which, it was contented, went to shew that mis-

feasances had been committed. Spain had made a careful investigation of the affairs of the company, but even after Beall had been privately examined under s. 115 of the Companies Act, 1862, it was considered that a sufficient disclosure could only be obtained by a public examination under s. 8 of the Companies (Winding-up) Act, 1890.

Stewart-Smith, for the petitioner. It has been found that a winding-up under supervision cannot be continued with due regard to the interests of the contributories. It is true that s. 10 of the Companies (Winding-up) Act, 1890, applies where a company is being wound up under the supervision of the Court, and therefore misfeasance proceedings might be taken without obtaining a compulsory winding-up order. But before taking these proceedings a more searching investigation into the affairs of the company is required. The private examination held under s. 115 of the Companies Act, 1862, has turned out to be insufficient, and what is required is a public examination under s. 8 of the Act of 1890. But s. 8 only applies when a compulsory winding-up order has been made, and the official receiver, therefore, now applies for that form of order under s. 14 of the Act of 1890. If this is not a case contemplated by the framers of that provision, it is difficult to say when the section does apply.

Norman Craig, for Wilson. The petitioner does not make out a case for a compulsory winding-up order. The object of s. 14 is to enable the Court to interfere at the instance of the official receiver when the voluntary liquidator is not doing his duty.

WRIGHT J. This is a case of great importance. It is very desirable that a person in the position of the official receiver should in a proper case be able to interfere with effect for such a purpose as is here suggested. There are two questions for my decision—namely, What is the real meaning of s. 14 of the Companies (Winding-up) Act, 1890 ? and, Has a sufficient case been shewn to justify an order being made under the section when its meaning has been ascertained? I have had a great

WRIGHT J. 1899 ~~ 1897 JUBILEE SITES SYNDICATE, *In re.*

doubt as to what the section means, but I think a reasonably wide construction ought to be given to it, and that, without straining its language at all, the section includes every case where the powers of the voluntary liquidator are proved, in the opinion of the Court, to be insufficient for the purposes of winding-up in so far as the interests of creditors or contributories are concerned. If, in short, the official receiver, after a compulsory winding-up order, would possess any power which the voluntary liquidator cannot exercise, and which is shewn to be necessary in order that there may be an efficient winding-up in the interests of the creditors or contributories, then s. 14 applies. That is the principal factor in the case. If that is the proper construction of the section, are the facts of the present case sufficient to bring it within the section? I think they are. There is a strong primâ facie case that there are persons who ought to be made to restore, if they have got it, the property of the company. When I find, as I do, that a zealous voluntary liquidator, acting under the advice of counsel of great experience, arrives at the conclusion that he cannot satisfactorily take proceedings for misfeasance without some examination going beyond that which may be obtained under s. 115 of the Companies Act, 1862—or, in other words, that a public examination under s. 8 of the Act of 1890 is absolutely necessary—then I think that a winding-up order under s. 14 of that Act should be made. I may add that I do not think an order should be made as a matter of course under s. 14. As here, a very strong case must be made out to justify the interference of the Court under that section. A compulsory winding-up order must be made.

Solicitors for petitioner: *Munns & Longden.*
Solicitor for Wilson: *C. H. Hoare.*

F. E.

In re S. FROST & CO., LIMITED.

C. A. 1899 May 31.

Company—Issue of fully paid-up Shares—Registered Contract—Sufficiency—Shares to be paid for otherwise than in Cash—Statement of Consideration—Description of Property purchased—Reference to prior Contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A contract in writing between a vendor and a company, filed with the Registrar of Joint Stock Companies, recited that by a prior agreement of a certain date, made between the vendor and a trustee for the company, it was agreed that the vendor should sell and the company should purchase "certain leasehold messuages, shops, and premises" and "all the goodwill of the several businesses carried on by the vendor on the same respective premises, together with all the machinery, plant, horses and carts, fixtures and fittings used in connection with the said several businesses." It also recited the incorporation of the company, and that, by an agreement made between the vendor, the trustee, and the company, it was provided that the purchase-money should be paid or satisfied by the allotment to the vendor of a specified number of fully paid-up shares, and payment of a specified amount in cash. The contract then witnessed that it was agreed that the company should file "this agreement" and should allot to the vendor a specified number of fully paid-up shares, and that the same should be accepted by the vendor in satisfaction of that portion of the purchase-money which under the prior agreement was to be satisfied by the allotment of fully paid-up shares. Neither of the recited agreements was filed. On a motion, by holders of some of the fully paid-up shares issued to the vendor, to rectify the register by striking out their names:—

Held, that the contract which had been filed determined, within the meaning of s. 25 of the Companies Act, 1867, that payment for the shares allotted to the vendor was to be otherwise than in cash, and sufficiently stated the nature of the consideration for the issue of the shares.

Judgment of Romer J., [1898] 2 Ch. 556, affirmed.

In re Maynards, [1898] 1 Ch. 515, dissented from.

APPEAL from a judgment of Romer J. (1)

A motion was made on behalf of shareholders in S. Frost & Co., Limited, that the register of the members of the company might be rectified by striking out their names.

By an agreement dated October 7, 1895, and made between Samuel Frost (thereinafter called the vendor) of the one part,

(1) [1898] 2 Ch. 556.

C. A. 1899 S. FROST & CO., LIMITED, *In re.*

and W. H. Chandler (thereinafter called the trustee), for and on behalf of the company thereinafter referred to and which was about to be formed, of the other part, the vendor agreed to sell and the company to purchase the respective leasehold shops, messuages, and premises mentioned in the schedule thereto, and the goodwill of the several businesses carried on upon the premises, together with all machinery, plant, horses, vans, carts, fixtures and fittings used in connection with the several businesses. The consideration to be paid to the vendor for the sale was to be the sum of 20,000*l.*, payable as to one moiety in fully paid-up shares of the company; and it was thereby provided that the proportions of the purchase-money payable in shares and cash respectively might be varied by substituting other classes or amounts of shares of the company, or a larger or less amount of cash and shares respectively, as the directors of the company and the vendor might thereafter mutually agree.

The company was duly incorporated on October 9, 1895.

By another agreement, dated October 21, 1895, and made between the vendor of the first part, the trustee of the second part, and the company of the third part, the company adopted and confirmed the last-mentioned agreement; and it was provided that the purchase-money of 20,000*l.* should be paid as follows—that is to say, by the allotment to the vendor, or as he should direct, of 15,689 fully paid-up ordinary shares of 1*l.* each, of 1717 fully paid-up preference shares of 1*l.* each, of seventy-five fully paid-up founders' shares of 1*l.* each, and by the payment to the vendor of 2519*l.* cash; and further that, before any of the fully paid-up shares were issued, a proper contract should be filed with the Registrar of Joint Stock Companies.

By an agreement dated November 18, 1895, and made between the vendor of the one part and the company of the other part, after reciting that by an agreement dated October 7, 1895 (being the agreement first above mentioned), it was agreed that "the vendor should sell and the company should purchase certain leasehold messuages, shops, and premises, and that the vendor should sell and the company should purchase all the goodwill of the several businesses carried on by the vendor upon the same respective premises, together with all the

machinery, plant, horses, vans, carts, fixtures and fittings used in connection with the said several businesses as therein mentioned," and after reciting the incorporation of the company, and that by the agreement (termed the supplemental agreement) of October 21, 1895, above mentioned it was provided that the purchase-money should be paid as is above set out, it was witnessed and agreed as follows: "(1.) The company shall forthwith cause this agreement to be filed with the Registrar of Joint Stock Companies. (2.) The company shall on or before 30th November, 1895, allot to the vendor or his nominees 15,689 fully paid-up ordinary shares of 1*l.* each of the company numbered respectively 4212 to 19,900 inclusive, also 1717 fully paid-up preference shares of 1*l.* each of the company numbered respectively 3084 to 5000 inclusive, and seventy-five fully paid-up founders' shares of 1*l.* each of the company numbered 1 to 75 inclusive. (3.) The said shares shall be accepted by the vendor in full satisfaction of 17,481*l.*, being that portion of the purchase-money of 20,000*l.* which under the hereinbefore-recited supplemental agreement was to be satisfied by the allotment of paid-up shares." This agreement, which was duly filed with the Registrar of Joint Stock Companies, did not contain any copy of the schedule to the agreement of October 7, 1895, or any further reference to the property comprised therein. The shares were shortly afterwards issued to the vendor and his nominees.

Doubts having been raised as to the sufficiency of the registered contract to protect from liability the holders of the fully paid-up shares, a motion was made before Romer J. to rectify the register. The learned judge held that the motion failed. (1)

The applicants appealed.

T. H. Carson, in support of the appeal. By s. 25 of the Companies Act, 1867 (2), the contract relating to the issue

(1) [1898] 2 Ch. 556.

(2) 30 & 31 Vict. c. 131, s. 25: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

C. A. 1899 — S. Frost & Co., Limited, *In re.*

of the fully paid-up shares must be filed, that is, it must for the first time render a particular mode of payment obligatory on the parties. In this case the mode of payment for the shares to be issued to the vendor was determined by the second agreement, and that has not been filed, and consequently the issue of the shares was invalid: *In re Almada and Tirito Co.* (1) It is pointed out in the judgments in that case that what the section intended to deal with was the mode of payment for the shares. This view is confirmed by the opinions expressed in the judgments in the House of Lords in *Ooregum Gold Mining Company of India* v. *Roper.* (2) *In re Maynards* (3) is an authority on this point. Further, it is not sufficient to file a mere confirmatory contract, unless it shews on the face of it the whole of the agreement by which payment is to be made otherwise than in cash. The contract which was filed does not determine this matter as required by s. 25, and at all events it is not the whole contract relating to it, so that it cannot be said that the contract required by s. 25 has been filed: *In re Jackson & Co., Limited.* (4)

Further, the filed contract does not sufficiently describe the consideration that the company were to receive for parting with the shares. The only description is in the recital, and from that the public would get no information as to the property which the company were to acquire. There is thus no disclosure of what the real capital of the company is: *Ooregum Gold Mining Company of India* v. *Roper.* (2) The consideration must appear in the document filed, otherwise it cannot be a complete contract, and the requirement of s. 25 are not complied with: *In re Kharaskhoma Exploring and Prospecting Syndicate* (5); *In re Maynards* (3); *Markham and Darter's Case.* (6) In the Statute of Frauds the object and words are different from those in s. 25, and decisions under the former statute will not assist in deciding the present question: *In re New Eberhardt Co.* (7) As to the view of Romer J., that if

(1) (1888) 38 Ch. D. 415.
(2) [1892] A. C. 125.
(3) [1898] 1 Ch. 515.
(4) [1899] 1 Ch. 348.
(5) [1897] 2 Ch. 451.
(6) [1899] 1 Ch. 414.
(7) (1889) 43 Ch. D. 118.

the document is held to be no contract within the meaning of s. 25 that section will prove to be a trap, there would be a remedy under the Companies Act, 1898 (61 & 62 Vict. c. 26), which is retrospective.

Howard Spensley, Junr., for the company, was not called on.

A. L. Smith L.J. This is an appeal which raises the question whether a contract registered under s. 25 of the Companies Act, 1867, is a contract which sufficiently determined, within the meaning of that section, that certain fully paid-up shares issued by the company were to be paid for otherwise than in cash.

First of all, there was an agreement of October 7, 1895, between a gentleman who carried on various businesses and a trustee for a company which was to be formed to take over these businesses. Then there was a second agreement between the vendor, the trustee, and the company, whereby the company adopted what is called the principal agreement, and an agreement was come to as to how the purchase-money was to be paid. Then there came the agreement which was registered, and as to which the question arises whether it is a sufficient contract within the section.

It seems to me that the construction put upon the words "the same" in s. 25 by the House of Lords in the *Ooregum Gold Mining Company of India* v. *Roper* (1) shews that in the case of the issue of fully paid-up shares they are to be taken to be issued subject to the payment of the whole amount thereof, unless the mode of payment for them is otherwise determined by a contract duly filed. It was argued for the appellant that the record agreement—that of October 21, 1895—was the real contract which dealt with the mode of payment for the shares issued to the vendor, and not the later agreement which was registered. It is true that the second agreement dealt with this question; but it was not a final agreement on the matter, because it expressly stipulates that before any of the fully paid-up shares were issued a proper contract should be filed. Then on November 18, 1895, the

(1) [1892] A.C. 125.

C. A. 1899 S. Frost & Co., Limited, *In re.* A. L. Smith L.J.

vendor and the company entered into the proper contract which was to be filed, as it was in due course. This contract was one under which the company could have sued the vendor for breach of covenant to sell to them, and the terms of it seem to me to be perfectly clear. The second clause says that the company shall allot a certain number of fully paid-up ordinary shares, a certain number of fully paid-up preference shares, and a certain number of fully paid-up founders' shares; and the third clause says that these shares shall be accepted by the vendor in full satisfaction of the specified amount of the agreed purchase-money, which under the recited deed of October 21 was to be paid by the issue of fully paid-up shares. I cannot by any ingenuity of which I am master see that this is not an express provision determining that the mode of payment for the fully paid-up shares is to be otherwise than in cash, and it is clear to me that this point fails the appellant.

Then it is said that the filed contract is only a part of the agreement between the parties, and does not shew the consideration that the company were to receive for their shares, and in support of this view *In re Kharaskhoma Exploring and Prospecting Syndicate* (1) is cited. In that case the agreement registered shewed no consideration at all, because it merely referred to another agreement which dealt with the consideration, while in the case before us the consideration is set out in the recital of the previous agreement of October 7, 1895. The consideration thus appears on the face of the document. But then it is said that in the description of the consideration there ought to be more particularity, though it was not suggested what degree of particularity is required. I entirely agree with the judgment of my brother Romer that it is not essential that the full particulars of the leasehold businesses and plant should be detailed in the filed contract. I cannot find in s. 25 anything requiring that such particulars should be set out. The decided cases go to this length—that the document must shew, to any person looking at it, what is the nature of the consideration; and I cannot find any authority for reading more than this into the statute. We find the

(1) [1897] 2 Ch. 451.

nature of the consideration for the shares stated and the consideration sufficiently identified, and that the contract sufficiently determines that payment for the shares shall be made in kind. I agree, therefore, with the conclusion of my brother Romer in this case, and not with the opinion expressed in *In re Maynards* (1), where the point was not fully argued before my brother Kekewich, and the appeal must be dismissed.

Rigby L.J. I am of the same opinion. I cannot doubt that the agreement which was filed was the contract between the parties, although there had been an antecedent contract to a similar effect. It appears to me that had it been necessary the vendor could have sued on the contract as it stands to compel the company to transfer the shares which they express themselves as contracting to issue to him. It would be no defence to such an action to say that there had been a prior contract dealing with the subject-matter of the contract sued on.

As to the expression of the consideration in the contract, it is essential that persons—shareholders or others—should have reasonable information as to the nature of the consideration given for shares which are issued as fully paid up. They are told on the face of this contract that the shares issued to the vendor are issued in respect of the purchase by the company of leasehold premises on which the vendor was carrying on business, and of the goodwill and stock-in-trade of the businesses there carried on. They thus know the nature of the consideration given. To hold otherwise and to say that it is necessary to recite the whole of the words expressed in the previous document would be to say that there must be a particularity which is in no way required for the contract. A contract for the sale of property which described it in the manner in which the property is described in this case and contained no further particulars would be good and binding, though to ascertain the value of the property passing a person interested might be obliged to make other inquiries. In the case before us there is no doubt as to what the purchase-money was paid for, and it is unnecessary to file the original

(1) [1898] 1 Ch. 515.

C. A. 1899 S. Frost & Co., Limited, *In re.* Rigby L.J.

agreement. I can see no reason why a confirmatory contract which fairly sets out the terms of an original one is not as good as the original, and my experience is that the practice is to file such confirmatory contracts. It is said that some text-writers doubt whether that is the right course to take; but I do not think their doubts can be taken to outweigh the practice of the profession. I agree with the judgment of my brother Romer, and not with the contrary view which was taken by my brother Kekewich in *In re Maynards* (1), where the point does not appear to have been fully argued. I can see nothing in *In re Kharaskhoma Exploring and Prospecting Syndicate* (2) which conflicts with the conclusion at which I have arrived.

Vaughan Williams L.J. I agree. Cases arising under s. 25 of the Companies Act, 1867, are somewhat difficult to decide. The difficulty arises not only from the fact that the section is not very happily worded, but also from the fact that, read it how you may, hard cases are certain to arise under it. The result is that the decisions of the Courts with reference to this section are not always on the same lines or on very definite lines, and the difficulty of construing the section is not so great as the difficulty of reconciling the decisions that have been given upon it. But I do not know of anything in the decisions that prevents me from going back to the Act and seeing if it cannot be construed so as to make it tolerably plain on which side of the line a contract must fall so as to make it a compliance with the statute. With regard to the word "determined" in s. 25, I do not accept the suggestion that it is used in a popular sense, for I think it has a legal sense and means "limited"; and what has to be filed is a contract limiting and determining the obligations of the shareholders; and if there is no such contract in writing, or if there is such a contract in writing but it is not registered, the issue of the shares is subject to payment in full. I may point out at once that s. 25 does not say that the contract to be filed is necessarily one between the shareholders and the company: it is to be a contract in writing as to shares which are issued as

(1) [1898] 1 Ch. 515. (2) [1897] 2 Ch. 451.

fully paid; and one knows that it is an every-day practice that there should be a contract between the vendor and the company for the issue to him or his nominees of fully paid-up shares. If that contract is filed, and it can be proved that shares were issued to shareholders under and by virtue of that contract, the liability of the shareholders will have been determined to be for payment for the shares otherwise than in cash. Although that may be so, this does not exclude the case where a shareholder enters into a contract with a company itself with respect to shares which he takes; and though the question does not arise to-day, I cannot imagine that if there were such a contract it would not be necessary to register it. If such an agreement is filed, the question arises whether that contract standing alone is sufficient. According to my understanding of s. 25, the registration of a contract which is complete in itself, in that it contains all that is necessary to constitute a contract, would be sufficient without any filing of the original bargain between the company and the vendor. Such a contract as I have indicated cannot, in my view, be properly called a confirmatory contract. It would not be between the parties to the original contract, but between the company and shareholders. If that is the nature of the contract, there would not be a compliance with the statute unless the whole of that contract were set out. But if there is no such contract, but only a contract with the vendor to allot to him fully paid-up shares, then the registration of that contract is sufficient, provided that the document discloses the consideration which is paid for the shares. Having regard to the judgments in *In re Kharaskhoma Exploring and Prospecting Syndicate* (1), what I have to do is to look at this document to see whether it expresses the whole of the contract so as to be a contract within s. 25. It is not for me to express a view as to the meaning of "contract duly made in writing," because I am bound by the expressions of the Law Lords in *Ooregum Gold Mining Company of India* v. *Roper* (2) that the object of this section was that information should be given as to the nature of the consideration for shares issued as fully paid up. That

(1) [1897] 2 Ch. 451. (2) [1892] A. C. 125.

C. A. 1899 — S. FROST & Co., LIMITED, *In re.* — Vaughan Williams L.J.

being so, it is agreed on all hands that the consideration must be stated on the face of the contract. Looking at this particular document, I do not think that any one familiar with the cases under the Statute of Frauds could doubt that the consideration is sufficiently stated to satisfy the requirements of the statute. It does not follow that it is sufficiently stated within s. 25 of the Companies Act, 1867, bearing in mind the observations of the Law Lords in the case I have just mentioned. With regard to what is necessary to satisfy the provisions of s. 25, the first observation I make on this is of a negative character: that it would not be a sufficient statement of consideration to refer to another document in which a statement of the consideration may be found. Another negative proposition is that it would not be sufficient to say that the consideration is the fact that some other contract has been entered into. We have, on the face of the contract which was filed in this case, a statement of the consideration; and, as I understand, it is sufficient if the consideration is stated generally—that is to say, if the kind or sort of consideration is sufficiently disclosed. If that is done, I agree with my brother Romer that it is not necessary to state the consideration with particularity or fully. In this case, if there were only what appears in the later or operative part of the contract, I do not think the consideration would appear to be fully stated, because all that appears there is the fact that the shares are to be issued to the vendor or his nominees, and to be accepted by him in part payment of the purchase-money. But, on looking at the recitals, it appears that the vendor was selling leasehold premises and the businesses carried on upon them, and the nature though not the particulars of the consideration appear. I agree, therefore, with the conclusion at which my brother Romer arrived.

Solicitors: *Edmonds & Rutherford.*

A. M.

JORDESON *v.* SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY.

C. A.
1899
March 20, 21, 23, 24, 25; *April* 12, 13; *May* 16.

[1896 J. 1503.]

Landowner—Gas Company—Statutory Powers — Nuisance — Excavation — Drainage—Surface, Letting down—Subsidence — Underground Water—Right of Support—Water-logged Land—Quicksand—"Running Silt"—Pitch, Stratum of—Ancient Lights, Interference with—Damages—Injunction—Gasworks Clauses Act, 1847 (10 *&* 11 *Vict. c.* 15), *s.* 29—*Gasworks Clauses Act*, 1871 (34 *&* 35 *Vict. c.* 41), *s.* 9—*Lord Cairns' Act* (21 *&* 22 *Vict. c.* 27).

The plaintiff was the owner of land with houses on it. The adjoining land belonged to the defendants, a gas company incorporated by special Act, with power to purchase land by agreement only, and subject to the provisions of the Gasworks Clauses Acts, 1847 and 1871. Under their statutory powers the defendants proceeded to excavate their land for the purpose of erecting a gasometer. In so doing they penetrated an underground stratum of quicksand, or sand loaded with stagnant water, geologically known as "running silt," which extended under the plaintiff's land as well as their own, the silt or sand largely preponderating over the water. In draining their excavation the defendants withdrew a large quantity of the running silt from under the plaintiff's land and thus caused a subsidence of the surface with consequent structural injury to his houses. The liability of the defendants to proceedings for any "nuisance" caused by them in the execution of their works was preserved by s. 9 of the Gasworks Clauses Act, 1871:—

Held, by the Court of Appeal (Lindley M.R., Rigby and Vaughan Williams L.JJ.), that the defendants had no statutory authority so to construct their works as to occasion a nuisance, the fact that s. 9 of the Gasworks Clauses Act, 1871, expressly preserved their liability for any nuisance distinguishing the case from *London, Brighton and South Coast Ry. Co.* v. *Truman*, (1885) 11 App. Cas. 45:

Held, also, by Lindley M.R. and Rigby L.J., that, on their view of the facts, the plaintiff's land was supported, not by a stratum of water, but by a bed of wet sand or running silt; and that, as the defendants had caused the subsidence of the plaintiff's land by withdrawing this support they had committed an actionable nuisance at common law entitling the plaintiff to damages: the decision in *Popplewell* v. *Hodkinson*, (1869) L. R. 4 Ex. 248, being inapplicable as dealing only with support by water:

But *held*, by Vaughan Williams L.J., that no nuisance giving a right of action had been proved, because, upon his view of the facts, the subsidence had been caused merely by the withdrawal, through the defendants' draining operations on their own land, of subterranean water-support of the plaintiff's land; and that, on principle as well as on the authority of *Popplewell* v.

C. A.
1899
JORDESON
v.
SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY.

Hodkinson, the withdrawal of subterranean water-support from a neighbour's land in the course of draining one's own land, even though it damages the neighbour's land, gives him no cause of action.

Decision of North J., [1898] 2 Ch. 614, affirmed.

The right of support for the surface of land by subterranean water, quicksand, or water-logged soil, discussed.

It being proved that the proposed gasometer would obstruct ancient lights in the plaintiff's houses:—

Held, by the Court of Appeal, that the plaintiff was entitled to an injunction to restrain the threatened infringement of his legal right, since it would not be adequately protected or vindicated by damages: *Martin* v. *Price*, [1894] 1 Ch. 276; *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287.

Popplewell v. *Hodkinson* held not applicable to a case in which subsidence of A.'s land had been caused by the working by B. on his own land of an underground stratum of natural pitch common to both lands. (See note, post, p. 260.)

APPEAL from North J. (1)

The plaintiff was the owner of land near Hull, and on that land there were houses or cottages some of which had existed more than thirty years before the commencement of the action. The first defendants were the Sutton, Southcoates and Drypool Gas Company, whose premises adjoined the plaintiff's land. The company were incorporated by a special Act of 1867 (30 Vict. c. xii.), which (s. 2) incorporated the Lands Clauses Consolidation Act, 1845 (except the powers relating to the purchase of lands otherwise than by agreement), and the Gasworks Clauses Act, 1847.

Sect. 51 empowered the company to purchase by agreement any quantity of land within the authorized limits not exceeding three acres. Sect. 53 empowered them to take licences to use patents for improvement in gas, with a proviso "that the company shall not be exempt by this Act to be proceeded against for any nuisance." Sect. 58 required the company to supply gas to any building on the application of the owner. Sect. 60 required them to lay down service-pipes to buildings; and s. 61 to supply gas to the public lamps at the request of the local board.

By s. 6 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), the undertakers are empowered to break up streets, &c.,

(1) [1898] 2 Ch. 614.

and lay down pipes and other works, and for that purpose to remove earth and materials and do all other works necessary for the supply of gas, doing as little damage as may be in the execution of the powers thereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers. Sect. 7 prohibits the undertakers from laying down pipes, &c, in any private land without the consent of the owners and occupiers. Sect. 12 provides that if the undertakers make any delay or omission in reinstating streets, &c., other parties may reinstate them and recover the expenses in the same manner as damages are recoverable under the general or the special Act.

Sect. 29 is as follows: "Nothing in this or the special Act contained shall prevent the undertakers from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas."

Sect. 5 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), prohibits the undertakers from manufacturing gas except upon the lands described in the special Act, and from storing gas, except upon those lands, without the previous consent in writing of the owner, lessee, or occupier of any dwelling-house situate within 300 yards of the limits of the site where such gas is intended to be stored.

Sect. 9 is as follows: "Nothing in this or the special Act shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them."

The preamble of the company's special Act of 1873 (36 Vict. c. lxxv.)—being an Act to amend their Act of 1867—recited that the company's existing lands were insufficient for their works, and that it was expedient that for such purpose the company should be empowered to purchase by agreement such of the lands shewn on the deposited plan and described in the schedule to the amending Act as they might require, and that they should also be empowered to purchase by agreement other lands, subject to the limitation by the amending Act prescribed. Then by s. 2 it was enacted that the Act of 1867 and this

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY.

amending Act should be read together as one Act, and by s. 3 that the Gasworks Clauses Act, 1871, should apply to the existing undertaking of the company. Sect. 4 enacted that the company might by agreement purchase or take on lease and use such of the lands shewn on the deposited plan, and described in the schedule to the Act, as they might require for the purposes of their undertaking. Sect. 5 authorized the company from time to time to purchase by agreement, hold and use any lands other than those described in the schedule which they might require, with a proviso that they should not hold more than six acres. And by s. 6 the company were authorized to erect on the lands shewn on the deposited plan and described in the schedule gasholders and other works for the manufacture and storing of gas.

The soil in the district in which the plaintiff's land and the defendants' gasworks were situate was principally clay, containing a large and extensive underground stratum of what was called "running silt," a substance or mixture consisting of fine sand or silt and stagnant water, the expression "running" merely indicating that, if the stratum was cut into, the silt would run through the opening made. In their natural and undisturbed state the component parts of the stratum were uniform throughout: there was no sediment of silt at the bottom and the water was found in equal quantities at all parts of the stratum. This stratum was well known to persons acquainted with the geological structure of the earth at Hull, and was, it appeared, a constant source of trouble to all who had to make deep excavations into it for building and other purposes. It extended for some miles both in length and breadth; it was some 6 feet in thickness and commenced some 22 feet below the surface of the land on which the defendants' works and the plaintiff's houses stood, the land being supported by this stratum as well as by the earth above and below it.

Before 1877 the defendants' works, which then included a gasometer of the maximum height of 68 feet from the ground level, were comparatively small and in no way injured the plaintiff's houses. But in 1877 the defendants resolved to

enlarge their works and to construct a very much larger gasometer than their then existing one. Its diameter was to be 152 feet and its maximum height 105 feet above the ground level. The defendants accordingly, under their statutory powers, purchased a piece of land adjoining the plaintiff's land, and in 1896 proceeded to excavate it in order to make the necessary tank for receiving the gasometer. The boundary between the plaintiff's and the defendants' land was about 6 feet from the excavation, and the plaintiff's houses were from about 7 to 12 feet from the boundary. The defendants reached down to and cut through the stratum of silt to a depth of about 37 feet from the surface, and in doing so took all other reasonable precautions by constructing a temporary barricade and otherwise to seal up the stratum and prevent the silt, as they cut through it and made their excavation, from falling in; the excavation they kept as dry as they could by frequent pumping, the effect of which was to cause large quantities of water, together with some silt, from the stratum under the plaintiff's land to ooze through the interstices in the barricade into the excavation. This water again had to be got rid of by pumping, some of the silt coming away with it in the process. The consequence was that, notwithstanding all the defendants' precautions, the land under the plaintiff's houses, through losing the support partly afforded by the stratum of running silt, subsided, the subsidence causing structural injury to the houses. It was not alleged that the houses by their weight caused the land to subside more than it would have done without them. The plaintiff then brought this action against the gas company, and also against the contractors employed in the construction of the circular tank in which the gasometer was to float, claiming damages against all the defendants for the structural injury caused to the houses by the subsidence of the surface, and an injunction to restrain the company from obstructing the ancient lights of the houses by the increased height of the proposed gasometer.

The action came on for trial before North J. and occupied several days in February, 1898, and, at the conclusion of the arguments, the learned judge expressed his opinion that upon

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY.

the facts proved the defendants, the contractors, had not been guilty of negligence in the execution of the works, though their precautions had proved insufficient to prevent subsidence; that such subsidence was occasioned by the escape of the running silt from the plaintiff's land, and that his houses had been damaged thereby; and that the lights of such houses would be materially obstructed if the proposed gasometer were raised to the full height contemplated; but in delivering a reserved judgment on August 4, 1898, on the points of law upon which the case is already reported (1), the learned judge granted an injunction to restrain the gas company from carrying their gasometer to a greater height than 68 feet, and gave judgment against all the defendants for 340*l.* damages in respect of the subsidence; also judgment for the whole costs of the action against the gas company, and for the costs of so much of the action as related to the subsidence against the defendants, the contractors.

The defendants appealed separately, but it was arranged between them that the appeal of the defendants, the gas company, should alone be argued, and that the defendants, the contractors, should be bound by the result of that appeal.

The appeal was heard on March 20, 21, 23, 24, 25; April 12 and 13, 1899.

The evidence read on the appeal, and which was very voluminous, was conflicting on the question how far the "running silt" was liquid rather than solid—as to whether it was muddy water as distinguished from wet sand; and also as to the precise nature of the substance which the defendants had removed by their pumping and other operations from under the plaintiff's houses.

As to the consistency of the stratum in question, the evidence went to shew that the quantity of water in it varied from time to time according to the rainfall, the proportion of water to silt or sand varying, according to different witnesses, from one-tenth of water to nine-tenths of silt, or from one-fifth of water to four-fifths of silt, all the witnesses agreeing that the silt always greatly preponderated over the water.

(1) [1898] 2 Ch. 614.

It was admitted that the structural damage of which the plaintiff complained had been caused by the defendants in the execution of their works; and it was not disputed that, if the defendants were liable to damages at all in respect of the subsidence of the plaintiff's land, 340*l.* was not an unfair assessment. With regard to the obstruction of light, it was not seriously disputed that the defendants' proposed gasometer would materially darken some of the plaintiff's ancient lights if it were erected to a greater height than that of the existing gasometer, namely, 68 feet above the surface of the ground. The effect of the evidence on the various points is sufficiently stated in the judgments of the Court of Appeal.

Haldane, Q.C., *Hon. E. C. Macnaghten, Q.C.*, and *Boome*, for the defendants, the gas company. With regard to the obstruction to the access of light to the plaintiff's houses, it is admitted that the defendants' gasometer will cause some obstruction; but the injury is one which can properly be compensated by damages under Lord Cairns' Act, 21 & 22 Vict. c. 27, and in such a case the carrying out of a work of a public nature ought not to be interfered with by injunction. The company's statutory powers authorize them to do what they have done and intend to do, and enable them to prevent the plaintiff from acquiring an easement.

With regard to the injury to the plaintiff's land by subsidence, the company have done nothing more than drain their own land, and this they are legally entitled to do. They have not deprived the plaintiff of any lateral support to which he is entitled. And in this case also the company are authorized by their special Acts to do what they have done, and it was their duty to do it in the particular place in which it has been done. *London, Brighton and South Coast Ry. Co.* v. *Truman* (1) applies, and not *Metropolitan Asylum District* v. *Hill.* (2) Those sections of the Gasworks Clauses Acts, 1847 and 1871 (10 & 11 Vict. c. 15, s. 29; 34 & 35 Vict. c. 41, s. 9), which render gas companies liable for a nuisance, do not apply. That which a company is expressly or impliedly authorized to

(1) 11 App. Cas. 45. (2) (1881) 6 App. Cas. 193.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES, AND DRYPOOL GAS COMPANY.

do cannot in law be a nuisance or be a legal wrong: *Rex* v. *Pease*. (1)

[RIGBY L.J. referred to *Jones* v. *Festiniog Ry. Co.* (2) as shewing that the doctrine of *Rex* v. *Pease* (1) has been to some extent limited.]

In *Jones* v. *Festiniog Ry. Co.* (2) express power to use locomotive steam-engines was not given by statute to that company, and therefore it was held that *Rylands* v. *Fletcher* (3) applied. In *Vaughan* v. *Taff Vale Ry. Co.* (4) the Court of Exchequer Chamber adopted the decision in *Rex* v. *Pease*. (1) The provisions for compensation contained in the Lands Clauses Consolidation Act, 1845, do not apply to a case of this kind: *Hammersmith and City Ry. Co.* v. *Brand*. (5) North J. laid great stress upon s. 2 of the company's special Act of 1867 (30 Vict. c. xii.) as excluding those parts of the Lands Clauses Consolidation Act which relate to the compulsory purchase of land; and he made a distinction between a railway Act and a gas Act in that no provision is made for compensation in the latter case. That was so in *London, Brighton and South Coast Ry. Co.* v. *Truman*. (6) And it has been decided that s. 68 of the Lands Clauses Consolidation Act, 1845, applies to the purchase of land by agreement as well as to compulsory purchase: *Kirby* v. *Harrogate School Board*. (7) That the plaintiff could not acquire an easement since the passing of the company's special Act of 1873 (36 Vict. c. lxxv.) is shewn by *Ayr Harbour Trustees* v. *Oswald*. (8) An agreement by the company not to carry their gasometer above a specified height would be of no effect, though they may have a discretion as to the necessity of carrying it to that height.

[VAUGHAN WILLIAMS L.J. referred to *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works*. (9)]

The provisions of the Gasworks Clauses Act with regard to

(1) (1832) 4 B. & Ad. 30.
(2) (1868) L. R. 3 Q. B. 733.
(3) (1868) L. R. 3 H. L. 330.
(4) (1860) 5 H. & N. 679.
(5) (1869) L. R. 4 H. L. 171.
(6) 11 App. Cas. 45.
(7) [1896] 1 Ch. 437.
(8) (1883) 8 App. Cas. 623.
(9) [1898] 2 Ch. 603.

nuisance do not apply here, for otherwise ss. 5 and 6 of the special Act of 1873 would be reduced to nonsense.

"Nuisance" does not mean interference with property; it applies only to a nuisance of a public nature. An injury which results from doing that which the Legislature has authorized to be done cannot in law be a nuisance. The section applies only to nuisances the commission of which can be avoided. If the plaintiff has any remedy at all it must be by compensation: *Emsley* v. *North Eastern Ry. Co.* (1)

[LINDLEY M.R. Is there any authority which shews that if a man drains his own land, and thereby lets down the surface of his neighbour's land, this is not actionable?]

Yes: *Popplewell* v. *Hodkinson* (2) and *Chasemore* v. *Richards*. (3) A man has a right to lateral support from his neighbour's land, but that neighbour has a right to drain his own land, even though by so doing he injures his neighbour. If a man builds houses upon land which is supported by running silt he must take the risk. It is a fallacy to say that the bed of silt was taken away by our pumping operations. The draining of our own land was a lawful act, and it was that lawful act which caused the subsidence. It was the abstraction of water which let down the surface, and that is not actionable: *Elliot* v. *North Eastern Ry. Co.* (4) There can be no property in water, even in a pond. Running water is treated, no doubt, upon a different footing. Water underground is the same for that purpose as water on the surface. As to the absence of compensation clauses from the defendants' Acts, *Ferrar* v. *London Commissioners of Sewers* (5) is inconsistent with the view of Lord Campbell L.C. in *Imperial Gas Light and Coke Co.* v. *Broadbent* (6) and of the Court of Appeal in *Kirby* v. *Harrogate School Board*. (7) There may or may not be a right to compensation, but in any event this action does not lie. It is not of the essence of the case to consider whether there is or is not a right to compensation: *Manchester, Sheffield and Lincoln-*

(1) [1896] 1 Ch. 418.
(2) L. R. 4 Ex. 248.
(3) (1859) 7 H. L. C. 349.
(4) (1863) 10 H. L. C. 333.
(5) (1869) L. R. 4 Ex. 227.
(6) (1859) 7 H. L. C. 600, 612.
(7) [1896] 1 Ch. 437.

C. A. 1899 — JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY.

shire Ry. Co. v. *Anderson.* (1) The reason why no compensation clauses are found in our Acts may be that the company had to get the consent of the owners within 300 yards. It may be that the consent has been paid for. If compensation was a matter of course under the general law, it was idle for the Legislature to provide that the consent of the owners must be obtained.

The nuisance sections do not reasonably apply to nuisance by obstruction of light or the taking away of support; they refer to nuisance in the ordinary and popular acceptation of the term.

[VAUGHAN WILLIAMS L.J. There is nothing in the Act to limit "nuisance" to public nuisance.]

It is nuisance in the working of the undertaking which is intended.

Bardswell, for the defendants, the contractors.

Upjohn, Q.C., and *Dighton Pollock*, for the plaintiff. Three questions are raised upon this appeal—(1.) The question of statutory right; (2.) The question whether the plaintiff has the right to light and support; and (3.) Has there been such an infringement of the plaintiff's rights as to entitle him to an injunction?

[LINDLEY M.R. So far as the obstruction of light is concerned we do not call upon you.]

As to our remedy on that point, we insist on our right to an injunction, for damages under Lord Cairns' Act would be insufficient. Upon the question of support we say that what the defendants withdrew was not water, but water and soil together; so that *Popplewell* v. *Hodkinson* (2) does not apply. If your Lordships do not agree with North J. upon the facts, then we say that *Popplewell* v. *Hodkinson* (2) depended on special circumstances, and there are other authorities in support of our case. As to the contention that the defendants' acts are authorized by statute, there is no statute conferring upon them the power to interfere with private rights. The defendants have done so, and, therefore, the plaintiff is entitled to succeed in this appeal.

(1) [1898] 2 Ch. 394, 400. (2) L. R. 4 Ex. 248.

It is expressly provided by the Acts that gas companies shall not be exempt from being proceeded against for nuisance. It is contended by the defendants that s. 6 of the Gasworks Clauses Act, 1847, cannot be made consistent with the construction which we put upon the nuisance clauses. No doubt powers to open streets and do all other acts necessary for the supply of gas are conferred upon the company, but what is specially authorized is not affected by the general provisions. Anything which is specially authorized cannot, of course, come under the head of a nuisance. Sects. 6–12 of the Act of 1847 really contain a code relating to this matter. In s. 7 there is an express reservation of private rights. Sect. 29 does not affect s. 6, and s. 6 throws no light upon the construction of s. 29. The words "in consequence of making or supplying gas" clearly include a nuisance created by the erection of an enormous gasometer.

Sect. 5 of the Gasworks Clauses Act, 1871, does not apply to lands described in the special Act. As to the lands not therein described, notices must be served upon owners within 300 yards of the site, and their consent must be obtained. No Act has ever been construed as sanctioning an avoidable nuisance. The Legislature did not intend to authorize an interference with private rights. Gas companies, although they have the privilege of supplying gas to the public, are to be regarded as commercial undertakings carried on for the benefit of their shareholders, and are not to be treated as entitled to override private rights.

Sect. 51 of the special Act of 1867, which gave the company power to acquire land, was subject to the general Act, and also to the special Acts. Therefore, the provisions as to nuisance in the Gasworks Clauses Act, 1847, and s. 53 of the special Act, which expressly provides "that the company shall not be exempt by that Act to be proceeded against for any nuisance," are applicable.

Even to the extent to which ss. 58, 60, and 61 of the Act of 1867 put the company under a duty, they were not obliged to put this particular gasometer in the place where they did.

C. A.
1899
JORDESON
v.
SUTTON,
SOUTHCOATES
AND
DRYPOOL GAS
COMPANY.

[LINDLEY M.R. referred to *Attorney-General* v. *Leeds Corporation.* (1)]

The preamble to the special Act of 1873 shews that the object for which it was passed was to empower the company to purchase by agreement further land, their then existing lands being insufficient for their works, and ss. 4 and 5 give such power. Under s. 6 they "may" erect gasholders; it is not compulsory on them.

It is negligence in the exercise of their statutory powers for which the company are liable if they cause a nuisance by not exercising their powers fully, when they would not cause a nuisance if they did exercise them fully. A company, for instance, might cause a nuisance by taking only three acres of land for their operations while they might not if they took six, and in that case they would be liable if they only took three: *Geddis* v. *Bann Reservoir Proprietors.* (2)

[LINDLEY M.R. referred to *Bradford Corporation* v. *Pickles.* (3)]

Here one cause of the nuisance is the inadequate size of the site provided for this large gasometer.

The company have no such implied authority to commit a nuisance as will bring them within the principle of *Rex* v. *Pease* (4) and *London, Brighton and South Coast Ry. Co.* v. *Truman.* (5) On the contrary, under their Acts they are expressly not exempted from liability for nuisance. The onus is on them to shew that they can do what is complained of: *Clowes* v. *Staffordshire Potteries Waterworks Co.* (6), *Imperial Gas Light and Coke Co.* v. *Broadbent* (7), *Attorney-General* v. *Gas Light and Coke Co.* (8), and *Shelfer* v. *City of London Electric Lighting Co.* (9) They have not shewn that two or three small gasometers would not do just as well for the supply of gas as this very large one. They have to shew that they have imperative orders from the Legislature which can-

(1) (1870) L. R. 5 Ch. 583.
(2) (1878) 3 App. Cas. 430, 455, 456.
(3) [1895] A. C. 587.
(4) 4 B. & Ad. 30.
(5) 11 App. Cas. 45.
(6) (1872) L. R. 8 Ch. 125.
(7) 7 H. L. C. 600.
(8) (1877) 7 Ch. D. 217.
(9) [1895] 1 Ch. 287.

not be obeyed without infringing on private rights, and they have not done that. Where powers are permissive only, and the undertakers have a discretion, that discretion must be exercised in conformity with private rights: *Hill* v. *Metropolitan Asylum District*. (1) This case falls within the principle of that decision, and not within the principle of *London, Brighton and South Coast Ry. Co.* v. *Truman* (2), as is shewn by the following circumstances: (1.) In this case there are no powers in the Acts enabling private rights to be interfered with. In *London, Brighton and South Coast Ry. Co.* v. *Truman* (2) the powers were compulsory—the company were obliged to use the land in the way in which they did for the purpose of their undertaking. (2.) In this case, as in *Metropolitan Asylum District* v. *Hill* (3), there was no power to take the land otherwise than by agreement; while in *London, Brighton and South Coast Ry. Co.* v. *Truman* (2), though the particular land in question could be acquired by agreement, when once it was acquired it became part of the undertaking. (3.) In the present case the Legislature has not authorized any particular work or building on a particular site; and (4.) there are no compensation clauses. Sect. 68 of the Lands Clauses Consolidation Act, 1845, only applies in cases where lands are acquired otherwise than by agreement, and consequently it does not apply in this case.

[LINDLEY M.R. You need not trouble about that.]

Next, as to the plaintiff's common law rights and their infringement—the right to light and to support. As to the right to support, with which alone it is now necessary to deal, assuming that the plaintiff has a common law right to support, the company have by their operations taken away water, or watery substance, which is part of the support of the land, and they have no right to do that without putting something into its place.

Assuming that what was taken out in the present case was water, whether clean or mixed with soil, the plaintiff has sustained an injury. There is no difference for this purpose

(1) (1879) 4 Q. B. D. 433; 6 App. Cas. 193.

(2) 11 App. Cas. 45.

(3) 6 App. Cas. 193.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY.

between pumping out water and excavating soil. The plaintiff does not claim any property in the water, but only the right to the support which it affords, and to which he is entitled as much as to support from soil or any other substance: *Backhouse* v. *Bonomi*. (1) *Chasemore* v. *Richards* (2) was a case as to water percolating underground in no known channel, and does not apply to this case, where the water was stagnant.

[VAUGHAN WILLIAMS L.J. referred to Yool on Waste, Nuisance, and Trespass, ch. ii. p. 149.]

Popplewell v. *Hodkinson* (3) only decided that, as between a vendor and purchaser, the circumstances must be looked at to see what mutual agreements must be inferred to have taken place between the parties on the severance of the land sold from other land of the vendor. It amounted in effect to a decision that the plaintiff had bought with notice that the neighbouring land might be built upon. It does not apply here, but belongs to the class of cases between vendors and purchasers of two tenements: *Rigby* v. *Bennett* (4), *Birmingham, Dudley and District Banking Co.* v. *Ross* (5), *Rowbotham* v. *Wilson* (6), *Broomfield* v. *Williams* (7), and *Phillips* v. *Low*. (8) *Elliot* v. *North Eastern Ry. Co.* (9) was not a case of the right to natural support, but a case between vendor and purchaser, and does not apply here. If the Court in *Popplewell* v. *Hodkinson* (3) had intended to decide the case on common law right, they would not have referred to *Elliot* v. *North Eastern Ry. Co.* (9), but to *Backhouse* v. *Bonomi* (1), *Earl of Lonsdale* v. *Littledale* (10), and *Humphries* v. *Brogden*. (11)

[LINDLEY M.R. referred to *Acton* v. *Blundell*. (12)]

In *Dalton* v. *Angus* (13) the principle of the right to support was discussed.

[VAUGHAN WILLIAMS L.J. A man cannot maintain an

(1) (1861) 9 H. L. C. 503.
(2) 7 H. L. C. 349.
(3) L. R. 4 Ex. 248.
(4) (1882) 21 Ch. D. 559.
(5) (1888) 38 Ch. D. 295.
(6) (1860) 8 H. L. C. 348.
(7) [1897] 1 Ch. 602.
(8) [1892] 1 Ch. 47, 50–1.
(9) 10 H. L. C. 333.
(10) (1793) 2 H. Bl. 267.
(11) (1850) 12 Q. B. 739.
(12) (1843) 12 M. & W. 324.
(13) (1881) 6 App. Cas. 740.

action for damage caused by the natural user by his neighbour of his own land: *Hurdman* v. *North Eastern Ry. Co.* (1)]

That was not a case of the withdrawal of support. *Popplewell* v. *Hodkinson* (2) was a case of surface drainage, which also makes it different from the present case. That case does not decide the general proposition that there is no right to support by water. At the most it decides that one man has not such a right of support as to prevent his neighbour from using his land in the usual way. We deny that the defendants in this case are using their land in the usual way. They are violating the maxim "Sic utere tuo ut alienum non lædas." Other authorities in the plaintiff's favour are *Grand Junction Canal Co.* v. *Shugar* (3) and *Birmingham Corporation* v. *Allen.* (4) In the latter case Sir George Jessel M.R. says that a landowner is entitled to have so much land left in its natural state on his boundary as will support his land even though, owing to the fickle nature of the land, he should want a quarter of a mile of it. There is no difference for this purpose between land which is friable and liquefied soil, or water. *Rigby* v. *Bennett* (5) and *Shelfer* v. *City of London Electric Lighting Co.* (6) are also authorities that the defendants are liable for the structural injury caused by their excavations to the plaintiff's property. The only case against us is *Popplewell* v. *Hodkinson* (2), and that case stands alone.

[LINDLEY M.R. It has been treated as law, has it not?]

It is cited by text-writers, but it has never been followed.

[RIGBY L.J. The point seems to have come before the Court in *Earl of Lonsdale* v. *Littledale* (7) in the Exchequer Chamber in Error. The question on which the case is reported was whether a peer of Parliament, after having pleaded to a bill filed in the Court of King's Bench, could maintain that he ought to have been sued by original writ and not by bill. It seems that the bill to which the Earl had pleaded was a bill in an action of trespass on the case in which Littledale, the defendant in error, recovered a verdict against the Earl, the

(1) (1878) 3 C. P. D. 168, 174.
(2) L. R. 4 Ex. 248.
(3) (1871) L. R. 6 Ch. 483.
(4) (1877) 6 Ch. D. 284.
(5) 21 Ch. D. 559.
(6) [1895] 1 Ch. 287.
(7) (2 H. Bl. 267, 299.

C. A. 1899 — JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY.

cause of action being damage by the Earl to Littledale's house by withdrawing water from a coal mine under the house and so causing subsidence and structural injury; but on that point the case does not appear to be reported anywhere.]

The case, so far as it appears from the report on the other point, favours our contention. Upon principle, what difference is there between excavating soil and drawing away water, where the surface is supported in the one case by the subjacent soil and in the other by subjacent water? It is true, the law does not recognise a legal right in percolating underground water: *Chasemore* v. *Richards* (1); but that is not this case. The right of an adjoining owner is to the ordinary enjoyment of his land, and consequently to the support of his land in its natural state by the neighbouring landowner: *Backhouse* v. *Bonomi* (2); *Birmingham Corporation* v. *Allen*. (3)

[VAUGHAN WILLIAMS L.J. referred to passages in the speech of Lord Selborne L.C. in *Dalton* v. *Angus*. (4)]

We base our claim on prescription. In Banks on Support, Appendix A, pp. 142–3, it is pointed out that if a man has had an enjoyment of support for twenty years his neighbour cannot interfere with that enjoyment, and that the broad principle of *Dalton* v. *Angus* (4) is that the law will not allow a man after twenty years to alter a state of things to which he must be taken to have assented. Though *Dalton* v. *Angus* (4) was a case of support by land, Lord Blackburn does deal with the question of causing subsidence by drainage. (5) *Lemaitre* v. *Davis* (6) is another illustration of the right to support after twenty years' enjoyment. Water may be, both logically and physically, as much a support as land. We submit, in conclusion, that both on authority and principle our right of support is injured even though it is only by the draining away of water; and that as the defendants are using their land in a manner not incidental to ordinary user, they are liable for the damage thereby caused.

Haldane, Q.C., in reply. There is no property in subterranean water unless it is caught and collected in some artificial

(1) 7 H. L. C. 349.
(2) 9 H. L. C. 503, 512.
(3) 6 Ch. D. 284, 289.
(4) 6 App. Cas. 740.
(5) Ibid. 816.
(6) (1881) 19 Ch. D. 281.

receptacle such as a well: *Ballard* v. *Tomlinson*. (1) If the plaintiff is right, a man miles off from another may not drain or improve his own land if by so doing he drains the other man's land.

Take the case of two adjoining properties, Whiteacre and Blackacre. The owner of Whiteacre excavates his land, the result of which is to draw away from Blackacre water with sand or silt. If the surface of Blackacre is brought down, what right of action has its owner against the owner of Whiteacre? There is no such action known to the English law. There is not a single case in which the question has been raised except *Popplewell* v. *Hodkinson*. (2)

[RIGBY L.J. It seems open to question whether *Popplewell* v. *Hodkinson* (2) decided that point or not.]

I say it did; and the decision has never hitherto been doubted: Kent's Commentaries on American Law, 12th ed. vol. iii. p. 437, note (*b*). The question seems to have been raised in *Earl of Lonsdale* v. *Littledale* (3), but it is impossible to ascertain the true facts from the report.

[LINDLEY M.R. Since the present case was last before us I have looked at the record to try and find out what were the facts proved at the trial of the action of *Earl of Lonsdale* v. *Littledale* (3), but have been unable to do so. (4)]

(1) (1885) 29 Ch. D. 115.

(2) L. R. 4 Ex. 248.

(3) 2 H. Bl. 267, 299.

(4) The following note of *Littledale* v. *Earl of Lonsdale* has been kindly supplied to the reporter by the Master of the Rolls. The case upon the writ of error is reported in 2 H. Bl. 267, 299, 2 Anstr. 356, and 5 Bro. P. C. 519.

Abstract of Judgment Roll (King's Bench). 31 Geo. 3—Trinity-Roll, 2305.

HENRY LITTLEDALE *v.* JAMES, EARL OF LONSDALE,

In a plea of trespass on the case.

The declaration comprises six counts:—

"(1.) That whereas the said Henry was seized of and in a certain messuage with stables, outhouses, buildings, yards and gardens thereto belonging in the parish of St. Bees in the county of Cumberland, and the said Earl was also lawfully possessed of all the mines and seams of coal lying under the said messuage and premises, and also of a certain other coal-mine situate and lying under certain other lands in the parish of St. Bees aforesaid.

"And whereas also before and at the time of committing the grievance next hereinafter mentioned there was a certain large mine of coal extending as well under the premises of the said Henry as under certain other lands

C. A. 1899

JORDESON v. SUTTON. SOUTHCOATES AND DRYPOOL GAS COMPANY.

It is singular that, although the question must often have arisen where excavations have been made in wet and spongy soil, or where the foundations of buildings have been sunk into low-lying ground containing underground water, the authorities are silent on an action of this kind; but surely, on principle, a man has a natural right to drain his own land, and if his neighbour chooses to build on ground of this nature, he takes

---

and tenements of the parish aforesaid contiguous and near thereto, which said mine had before that time been dug and worked, and then and for a long time before had large quantities of water confined therein which could not be emptied or discharged without greatly endangering the earth, soil and ground over the same and the buildings thereon erected.

"The said Earl cut and caused to be cut certain drifts from the said last-mentioned mine, and so negligently, incautiously and improvidently managed and carried on the same that for want of due care and caution of himself or his servants the water confined in the said mine was let loose and discharged along the said drifts, whereby the support of the messuage and premises of the said Henry was greatly damaged and destroyed, and the messuage, outhouses and buildings much rent and cracked and in great danger of falling, and the said Henry had to remove himself and his family and effects therefrom at great expense.

"(2.) That the said Earl by negligently and incautiously digging and searching for coal in another mine did similar damage to another messuage of the said Henry."

(3.) A similar count with regard to another messuage.

(4.) A similar count with regard to another messuage.

(5.) A similar count with regard to another messuage.

The case coming on for trial at the assizes at Carlisle on August 26, 31 Geo. 3 (1791), the jury say that the Earl is guilty on the first, second and third counts, and assess the damages at 3517*l.*, and as to the residue of the matters laid to his charge they say he is not guilty.

Judgment given accordingly at Westminster on August 15, 32 Geo. 3 (1792), with costs.

Afterwards the process was continued in the Exchequer Chamber on a writ of error, and on November 27, 34 Geo. 3 (1793), the judgment of the King's Bench was affirmed.

The record and process were then returned in Parliament by virtue of the King's Bench writ dated November 13, 34 Geo. 3, and deliberation being thereupon had on March 26, 1794, the judgments aforesaid were in all things affirmed.

The errors alleged were:—

"(1.) That by the record it appears that the judgments were given for the said Henry upon the three first counts of the declaration, when by the law of the land of this kingdom general judgments ought to have been given for the said Earl against the said Henry.

"(2.) That the said Earl being a peer of the realm, the said Court of our said Lord the King before himself had no jurisdiction to proceed by bill against the said Earl, as it appears by the record the said Court has proceeded."

the risk of the excavation on the adjoining land causing a shrinkage of his own land. As to the maxim, "Sic utere tuo ut alienum non lædas," Erle J. in *Bonomi* v. *Backhouse* (1) pronounced it as "mere verbiage," and he says that a man may damage the property of another where the law permits. In *Popplewell* v. *Hodkinson* (2) Cockburn C.J. said: "Although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if, for any reason it becomes necessary or convenient for him to do so." Therefore the law of support has really nothing to do with the case of water. So the law has stood since 1869. *Shelfer* v. *City of London Electric Lighting Co.* (3) was not a case causing subsidence by the abstraction of water, and is therefore no authority upon the present case. *Grand Junction Canal Co.* v. *Shugar* (4) was the case of a flowing stream, not still water, and therefore does not apply. *Acton* v. *Blundell* (5) was a case of draining off water already artificially collected in a well, and therefore has very little to do with the present point. *Humphries* v. *Brogden* (6) was a case of the right to the support of land by land, and was not a decision as to water-right at all, the two questions being quite distinct. (7) It is right I should mention that the precise point seems to have been recently decided in the American Courts in *Cabot* v. *Kingman* (8), which was heard before seven judges, who were not unanimous, three of them expressing the opinion, on the authority of *Popplewell* v. *Hodkinson* (2), that the withdrawal of running quicksand from under the surface of the plaintiff's land by the defendants' excavations in their own land, and so causing the surface of the plaintiff's land to fall in, was not an actionable wrong, though the other four judges thought otherwise. The Roman law and the French law on the subject will be found in Gale on Easements, 6th ed. p. 337.

Cur. adv. vult.

(1) (1858) E. B. & E. 622, 643.
(2) L. R. 4 Ex. 248, 251.
(3) [1895] 1 Ch. 287.
(4) L. R. 6 Ch. 483.
(5) 12 M. & W. 324.
(6) 12 Q. B. 739.
(7) Ibid. 753.
(8) (1896) 166 Mass. Rep. 403.

C. A. 1899

JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY.

May 16. LINDLEY M.R. This is an appeal by the defendants from a judgment by North J., granting an injunction restraining the defendants from darkening some ancient lights in some buildings of the plaintiff, and ordering the defendants to pay to the plaintiff 340*l.* in respect of damage caused by the subsidence of the plaintiff's buildings by reason of the construction of the defendants' works.

The defendants contend, first, that assuming that the plaintiff's lights will be darkened, and that the defendants have damaged his buildings, still no action lies against them, having regard to their parliamentary powers; secondly, that as regards the lights, assuming an action will lie, no injunction ought to be granted and that damages only ought to be awarded; and, thirdly, that, as regards the damage caused by such subsidence, no action lies because such subsidence was occasioned by pumping water out of the defendants' own land and thereby draining water from under the plaintiff's land, which the defendants say gives no right of action. Before examining these contentions, it will be convenient to state the undisputed facts which have given rise to this litigation. [His Lordship then stated the above-mentioned facts, and continued :—]

I pass now to the contentions of the appellants. First, as to the protection afforded them by their special Acts and the statutes incorporated with them. The defendants contend that, whatever their liability would be apart from those Acts, they are protected by them against such actions as the present, and they base this contention on the *London, Brighton and South Coast Ry. Co.* v. *Truman*. (1) But, in my opinion, the nuisance clauses contained in the Acts which govern this case render that decision wholly inapplicable to it. The nuisance clauses are the following : Sect. 29 of the Gasworks Clauses Act, 1847; s. 9 of the Gasworks Clauses Act, 1871; s. 53 of the company's special Act of 1867. Of these s. 9 of the Gasworks Clauses Act, 1871, is the most important, for s. 29 of the Act of 1847 may, perhaps, be confined to nuisances by gas; and s. 53 of the Act of 1867 relates primarily to the acquisition of patents for making gas, and the proviso at the end, although quite

(1) 11 App. Cas. 45.

general in its terms, ought perhaps to be read as only qualifying the earlier part of the section in which it occurs.

Sect. 9 of the Gasworks Clauses Act, 1871, is clear and unambiguous. It runs thus: "Nothing in this or the special Act shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them." This section is made applicable to the defendant company, and to the works complained of, by ss. 2 and 3 of their special Act of 1873. This section is, in my opinion, conclusive against the defendants. If they could shew any enactment expressly or by necessary implication authorizing them in terms to erect a gasometer at the place where this is, and of the dimensions desired by them, or any express or necessarily implied authority to cut through the stratum of running silt, and if they could shew that it was impossible to exercise those clearly conferred powers without creating damage to their neighbours, the decision in *London, Brighton and South Coast Ry. Co.* v. *Truman* (1) would protect them. But the statutes which we have to consider fall far short of what is necessary to exclude the application of s. 9 of the Act of 1871. Upon this part of the case the decision of the *Attorney-General* v. *Leeds Corporation* (2) is very instructive. It was there in vain contended that an enactment similar to that contained in s. 9 (3) was inapplicable, because what was authorized could not be done without causing a nuisance to other people. The answer was that there was nothing to shew that Parliament knew that such was the case, and nothing which clearly authorized the acts of the defendants even if they occasioned a nuisance. There are other cases to the same effect, but it is unnecessary to refer to them. Other minor contentions were raised by counsel for the appellants in support of their main argument, but in the view I take of s. 9 of the Act of 1871 it is unnecessary to refer to them.

As regards the injunction against carrying the gasometer higher than it is, this Court has recently considered when damages ought and when they ought not to be awarded

(1) 11 App. Cas. 45. (2) L. R. 5 Ch. 583.
(3) L. R. 5 Ch. 584.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. Lindley M.R.

instead of an injunction: see *Martin* v. *Price* (1) and *Shelfer* v. *City of London Electric Lighting Co.* (2) Consistently with those decisions an injunction ought not, in my opinion, to be refused. The plaintiff's rights will not be adequately protected or vindicated by damages.

The liability of the defendants to pay damages caused by the subsidence of the plaintiff's buildings requires careful consideration. That the defendants have, in fact, caused such subsidence and damage resulting from it is clear beyond all controversy. Primâ facie they have no right to do this: see *Dalton* v. *Angus*. (3) It is for them to justify their conduct if they can. Their attempt to do so by their special statutory powers fails for the reasons already given. But they say that, even if that is so, they are not liable at common law for the damage by subsidence because, first, they only pumped water from their own land; and, secondly, because, although some sand came with the water so pumped, the stratum of running silt under the plaintiff's land only shrunk by reason of the abstraction of water from it, and that no soil, in any appreciable quantity at all events, was removed from under the plaintiff's buildings. The defendants say, in short, that the subsidence was caused by the withdrawal of underground water from the plaintiff's land by lawful pumping on their own land, and that, although damage to the plaintiff ensued, no nuisance or other actionable wrong was committed by them. For this they rely on *Popplewell* v. *Hodkinson*. (4) The questions thus raised are extremely important and by no means free from difficulty.

First, as to the facts. No borings were made in the plaintiff's land, but it was not contended that in its natural state the land contained a stratum of clear water resting on a bed of sand. The running silt was a bed of wet sand, the amount of water in it varying from time to time, according to the rainfall; but in its ordinary state, if cut through, its equilibrium would be disturbed, and it would run or flow down where cut through if not prevented from so doing. An excavation cut into or

(1) [1894] 1 Ch. 276.
(2) [1895] 1 Ch. 287.
(3) 6 App. Cas. 740.
(4) L. R. 4 Ex. 248.

through it would disturb its equilibrium for some distance all round; and the conclusion at which I have arrived from the evidence is that the operations of the defendants, carefully and skilfully conducted as they were, consisted in removing large quantities of silt from their own land and in pumping on their own land whatever they could get away by pumping; and that the combined effect of both operations was to disturb the equilibrium of the wet sand underneath the plaintiff's houses and to cause such sand to shift its place and move towards the excavation made by the defendants. The plaintiff's houses were supported by a bed of wet sand and not by a stratum of water, and they have been let down by a shifting of such sand caused by the removal by the defendants of sand and water from their own soil. This is also the conclusion at which North J. arrived, if I understand him rightly. I do not think it necessary to examine in detail the voluminous evidence bearing on this point, all of which I have studied with care, and the evidence of the plaintiff's witnesses is not, in my opinion, displaced by the defendants' witnesses. In this view of the evidence it is unnecessary for me to decide whether, if the defendants had done nothing more than pump underground water from their own land and thereby let down the plaintiff's houses, an action could have been maintained against them. *Popplewell* v. *Hodkinson* (1) looks like and has generally been regarded as an authority that no action will lie in such a case. But I am not satisfied that this broad question can be considered as finally settled by that or any other decision. The question involves very important considerations. Two conflicting rights have to be reconciled—namely, the right to support and the right to pump water. It is not necessary to decide which is to give way to the other. I leave the question where it is. I shall assume in the defendants' favour that an action will not lie for damage caused by pumping water only. They have done more, and what they have done is, in my opinion, an actionable nuisance at common law. If this point is decided in favour of the plaintiff, the defendants do not quarrel with the damages assessed. The only case I know of

(1) L. R. 4 Ex. 248.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. Lindley M.R.

in which the legal consequences of cutting through quicksand have been considered is the American case of *Cabot* v. *Kingman* (1), to which Mr. Haldane referred us. The Court was the Supreme Court of Massachusetts, and the majority of four to three adopted the conclusion which I have expressed. The grounds of their opinion are given on page 405, and I cannot conclude my own judgment better than reading what I there find. Field C.J. said (2) :—

"Whatever may be true of percolating waters, we think that the defendants had no right to take away the soil of the plaintiff in land which they had not taken under the statutes, and that it is immaterial that the soil was removed by means of pumps from the trench into which it had fallen by its own weight, or had been carried by percolating water. We are unable to distinguish the case from one where the soil falls in from the surface in consequence of an excavation in the adjoining land. The plaintiff, if the facts be as he offered to prove, has been deprived of the lateral support to his land, in consequence of which the quicksand has run from under the surface of his land into the trench, and has been removed by means of pumps, and this has caused the surface to settle and crack. It was the duty of the defendants to prevent this in some manner, if they did not take the plaintiff's land."

The judgment of North J. is, in my opinion, correct on all points, and the appeal must be dismissed, with costs.

RIGBY L.J. I agree entirely with what has been said by the Master of the Rolls on the construction of the Acts of Parliament, and have nothing to add on that part of the case. I agree also in his conclusions that an injunction should be granted against darkening the plaintiff's ancient lights. I will only add that, in my opinion, the Courts ought to take great care to prevent undertakers with statutory powers from exceeding those powers, and under pretence and colour thereof in effect expropriating landowners whose lands are outside of their real scope, and that this ought to be a leading consideration

(1) 166 Mass. Rep. 403. (2) 166 Mass. Rep. 405.

when the question of remedy by injunction or damages is being dealt with.

I proceed to the question of subsidence. It is admitted that the operations of the defendants have caused a subsidence of the surface of the plaintiff's land, and that the sum of 340*l.*, assessed and allowed by the learned judge in respect of the damage thereby done to the buildings standing thereon, is not more than ought to be allowed if the plaintiff has a cause of action.

The defendants, however (while admitting the damage to have been occasioned by them and to be fairly represented by the 340*l.*), say that there is no cause of action against them, inasmuch as they have only done what they had a right to do—that is to say, have only exercised the right of draining their own soil; and they rely upon the case of *Popplewell* v. *Hodkinson* (1) as an authority covering the present case and deciding in their favour the point in dispute. I will deal later with that case, so far as appears to be necessary for the purposes of the present litigation; but in the first place I think it desirable to state the material conclusions of fact at which I have arrived from perusing the voluminous and, in some parts, contradictory evidence to which we have been referred. [His Lordship then reviewed the evidence at considerable length, especially as to the natural consistency of the stratum in question, upon which he came to the conclusion that, having regard to the relative proportions of the solid and liquid parts, the silt was not held "in suspension" by the water, as some of the witnesses had stated, but that it would be more correct to describe the contents of the stratum as "wet silt" than as "water with silt in it." His Lordship further came to the conclusion that the defendants had not effectually sealed the stratum by their barricade, so that not only water but also a considerable amount of silt escaped into the excavation through the interstices of the barricade, and that the liquid pumped out of the excavation contained a substantial proportion of silt. His Lordship then proceeded:—]

It is plain that the unsealed stratum must have run, with

(1) L. R. 4 Ex. 248.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. Rigby L.J.

the silt in it, up to a considerable extent from under the plaintiff's land, and the mischief done to the houses must have been owing to a considerable extent to the act of the defendants in withdrawing soil in the form of silt from beneath the plaintiff's land. I agree with North J. that this cannot be included within any reasonable meaning of the word "draining," and for that reason the case cannot fall within the decision in *Popplewell* v. *Hodkinson*. (1) Indeed, I do not think that any of the decisions as to water can apply to running silt such as is found where the plaintiff's and defendants' properties come together. There is no authority for saying that there cannot be property in a bed of running silt.

Further than that, it is abundantly clear that the physical attributes of water and of running silt are altogether different. The latter cannot be drained to an indefinite distance. Indeed, one of the defendants' witnesses says that it has a steep hydraulic gradient; meaning, as is plain from the rest of his evidence, that if the stratum is cut across and left open, the water will not drain out of it except for a comparatively moderate distance. This seems to me consistent with the rest of the evidence, and brings the case of the bed of running silt more near to the case of loose soil which will fall down when the lateral support of similar soil is removed, than to that of water which may draw away other water from land leagues distant from the place where operations are being carried on.

It has been argued that the case of *Popplewell* v. *Hodkinson* (1) has established the rule that under no circumstances can there be any right to support to land from water; or, in other words, that any landowner may, by operations on his own land, draw away water not flowing in a defined stream from beneath his neighbour's land without regard to any consequence which may arise to that neighbour. Even if that were so, it would not follow that a bed of running silt, such as we have to deal with in the present case, could be drawn away; and in my judgment the extreme logical conclusion from the proposition really established in *Popplewell* v. *Hodkinson* (1) would not lead to such a result. That case, in my opinion, has

(1) L. R. 4 Ex. 248.

no application to the present. I do not, therefore, intend to express a final judgment as to the exact interpretation of that case, though, as at present advised, I am by no means prepared to give it so far-reaching an effect as is contended for. There are two doctrines sufficiently indicated by the maxims "Cujus est solum ejus est usque ad inferos," and "Sic utere tuo ut alienum non lædas," which have to be considered. These doctrines, driven to their logical extreme, are irreconcilable. Some practical limitation of one by the other has to be arrived at. The first doctrine gives everything below the surface to the landowner; but it has been settled that by reason of the second doctrine he cannot take away his own minerals with the result of letting down his neighbour's surface, or ancient buildings on his neighbour's land, to the damage of that neighbour, without being liable, so long as he remains in possession of the chamber from which the minerals have been withdrawn, to an action by that neighbour. Here is one plain and important limitation of the landowner's right. *Popplewell* v. *Hodkinson* (1) seems to me to be a corresponding limitation of the right which a neighbour would have if the second doctrine were driven to its extreme logical conclusion. If, with regard to a swampy tract of land, it were held that no man could drain his own soil because by so doing he would also drain his neighbour's and so let down the surface, the ordinary beneficial enjoyment of the land would be impossible without agreement by all the landowners affected, and the rule would be "once a morass, always a morass."

It is against this extreme logical result that I am disposed to consider the decision in *Popplewell* v. *Hodkinson* (1) to be directed. Having come to the conclusion that in such a case as that before the Court there was no natural right on the part of the plaintiff to prevent his neighbour from draining his land for ordinary uses that might be foreseen (including, under the circumstances of the particular case, the obtaining of a proper foundation for substantial buildings), although the result might be to let down the plaintiff's surface in its natural condition—the conclusion was not altered by the fact that, two or three

(1) L. R. 4 Ex. 248.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. Rigby L.J.

years before action, the plaintiff had chosen to build small houses on the insecure foundation of his own swampy soil. The Court recognised the possibility of such a right as that claimed by the plaintiff being conferred by grant express or implied, which in my judgment involves the conclusion that, when support to buildings from water is enjoyed for twenty years, the right to it becomes absolute.

In the present case the houses damaged had been built for considerably more than twenty years when the support was withdrawn from them, and, according to the principles enunciated by the Court in *Popplewell* v. *Hodkinson* (1), the defendants would not have been acting within their right even if their operations had been confined to surface drainage of water.

The other cases relied upon appear to me quite insufficient to supply the extensive operation sought to be attributed to *Popplewell* v. *Hodkinson* (1); and in my judgment several of them, if closely examined, tend to greatly confine its application. As, however, I do not think that *Popplewell* v. *Hodkinson* (1) applies to this case, I abstain from discussing the cases referred to.

VAUGHAN WILLIAMS L.J. In my judgment the facts proved in this case are not such as to justify the conclusion that the defendants have caused a subsidence of the plaintiff's land otherwise than by a withdrawal of the support given to the land by underground water, which withdrawal resulted from the lawful dealing by the defendants with their own land.

North J. found as a fact that the stratum in question consisted of water and silt mechanically suspended in the water, and that the two—that is to say, the water and the silt—escaped together to a considerable extent. He says that if there had been no water but silt alone, it (the silt) would have been part of the stratum by which the surface of the plaintiff's land, on which the buildings stood, was supported; and that when the water was withdrawn, taking, as it must have taken (and as North J. finds it did take), silt with it, there was a subtraction

(1) L. R. 4 Ex. 248.

of not merely water, but what was substantially water plus, substantially, silt.

Upon this finding in fact, I do not think that any subsidence of the plaintiff's land has been caused by the withdrawal by the defendants of silt or any other *land* support. I do not think that the silt suspended in water did in fact or could afford any support to the plaintiff's land. I think that the subsidence would equally have occurred if the barricade erected by the defendants had been of such a character that no silt or sand, but water only, could have passed through it. I think that the particles of silt or sand merely operated to reduce the quantity of water necessary to constitute water a support, but that it was the water alone which afforded the support. No doubt less water was required by the exclusion or displacement of water by the presence of the silt or sand; but in my opinion it was nevertheless the water which, held together by every part of the superincumbent stratum as well as by the impervious curve of clay which contained the water, constituted the support. Water in such a position is in effect an incompressible solid mass. In such a state of things I should expect the mere withdrawal of the vertical pressure of the defendants' land upon water immediately subjacent to his land—which water was part and parcel of a continuous body of water extending under both the defendants' land and the plaintiff's land—to cause a withdrawal of some of the water, and consequently of the support of the surface at the former level. If the defendants are under an obligation not to withdraw this vertical pressure, the obligation can hardly be described as an obligation to afford a lateral or subjacent support. It is a withdrawal of vertical pressure.

I think that the water with silt or sand in suspension had all the qualities of water, and that it was the effect of the defendants' working on the mixture in respect of its characteristics as water which caused the subsidence of the land.

I doubt whether any quantity of running sand could, so long as it continued to be running sand intermixed with water, afford, otherwise than as a liquid, any support to the superincumbent land stratum; and the liquid in the present case

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. Vaughan Williams L.J.

was, on the finding of North J., subterranean water with silt or sand in suspension. The silt or sand in the present case at all events was not dry, and there is no evidence as to whether when dry it would continue to run under pressure or be in any sense running sand: it certainly would not, unless accompanied by water, rise above the level at which it was ejected by the pressure, as this sand is said to have done at Hull Docks.

In the foregoing observations I have accepted the conclusion in fact of North J. as to the nature of the stratum.

There are difficulties in accepting this conclusion as strictly accurate, for, in pure water, sand could (in the absence of motion) only be held in suspension if the specific gravity of the sand and water were equal; but even if one rejects the evidence of the plaintiff's expert witnesses, which North J. seems to have accepted, as to the nature of the stratum, as unreliable, yet it seems to me that the silt or sand must either have been deposited by gravity beneath the water (and some of the evidence points to this), or the particles of sand must have so rested on one another as to leave interstices admitting of the presence of water; but, whichever of these is the proper conclusion, it seems to me equally to follow that it was the withdrawal of the water which caused the subsidence. In the former case obviously it was so, and in the latter case I think that the evidence of those witnesses is right who say that the equilibrium of the sand was produced by the equal pressure of the water in the water-bearing stratum, and that if you remove that pressure on one side then you convert the equilibrium into a state of active forces. It seems to me that you do remove that pressure by the excavation quite irrespective of the pumping. This is shewn by the fact that it was the influx of water which necessitated the pumping, although the pumping was also used to dry the silt. All the witnesses agree that the water, as it oozed through the barricade, brought silt or sand with it. It may be that the sand in a state of equilibrium produced by the pressure of the water afforded support to the superincumbent stratum of earth; yet, if this support was dependent on the pressure of water, the

case does not differ from the subsidence of the surface from the withdrawal of water-support. The sand in such case forms portion of the supported surface.

Unfortunately, in this case the evidence of the witnesses is not only contradictory inter se, but the evidence of individual witnesses is not consistent. [His Lordship then reviewed the evidence, and continued:—]

The result is that in my judgment the evidence establishes that the subsidence of the plaintiff's land has been caused merely by the withdrawal of water-support, produced by excavations by the defendants on their own land.

This state of things raises the question whether there is by the common law an obligation not so to deal with land as to withdraw water-support of the surface of land owned by others; or, to state the question conversely, whether there is a right to water-support for land.

Now, in my judgment the case of *Popplewell* v. *Hodkinson* (1) is a clear authority that there is no such obligation and no such right. That was a case in which the subsidence was caused by excavations made to a great depth for the purpose of the foundation of a church about to be built on wet and spongy land which let down the plaintiff's cottages built on adjoining land of the same character. The result of the excavation was that the plaintiff's land was drained and subsided, and the houses built on it were cracked and injured. The land would have subsided even if no buildings had been erected on it. The Court held that no action would lie. Cockburn C.J. in the course of the argument asked: "What right, independently of the principle that 'no one can derogate from his own grant,' can a man have to prevent his adjoining owner draining his own land? If, in the process, the adjoining owner subtracts underground water from his neighbour, can that alone give a cause of action?" And in his judgment Cockburn C.J. says (2): "although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil if, for any reason, it becomes necessary or convenient for

(1) L. R. 4 Ex. 248. (2) L. R. 4 Ex. 251.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. Vaughan Williams L.J.

him to do so." And the rest of the judgment consists merely of a negation of a contention on behalf of the plaintiff that the fact that the land of the plaintiff had been sold and conveyed to him by the grantor for building purposes, and that the grantor took a covenant from the grantee that buildings should be erected of a sufficient value to secure the chief rent, raised an implied condition that the grantor would not drain and that there was an obligation on him and those who claimed through him only to drain to such an extent as the nature of the building to be erected rendered safe and desirable. There is nothing else in the judgment, which was a judgment of the Court of Exchequer Chamber to which Keating, Lush, Hannen, and Brett JJ. were parties.

It is quite true that in the Court of Exchequer the judgment was put on two grounds—first, that the defendant was entitled to make the excavation which caused the damage complained of; and, secondly, that, even assuming the plaintiff would primâ facie have had a right to the support of underground water, he could not, under the circumstances of the case, recover. He had built his cottages without taking any precautions to make his land fit to bear them, and was therefore not in a position to complain of the defendant's act.

It seems to me, moreover, that the decision that there is, irrespective of grant, no right of support to land from underground water, is consistent with all the English cases and is right in principle.

The English authorities practically begin I think with *Acton* v. *Blundell* (1), for I do not think that there is anything decided in *Earl of Lonsdale* v. *Littledale* (2) which really affects the question.

In *Acton* v. *Blundell* (1) the action was by the owner of land through which water flowed in a subterranean course, and it was held that he had no interest in it which would enable him to maintain an action against a landowner who, in carrying on mining operations, drained away water from the plaintiff's land and "laid his well dry." There was no claim for damage for subsidence of the plaintiff's land caused by the withdrawal

(1) 12 M. & W. 324. (2) 2 H. Bl. 267.

of the water by the defendant's operations on his own land; but Mr. Cowling, the counsel for the plaintiff, in his argument urged that if there was an absolute right for a landowner by operations in his own land to abstract subterranean water from the land of another landowner, there would be no liability "although their neighbours' land should sink in consequence of the water being abstracted from under it" (1); and Tindal C.J. at the conclusion of his judgment says "that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of damnum absque injuriâ, which cannot become the ground of an action." (2)

The Chief Justice (notwithstanding the argument of Mr. Cowling) does not except from his statement of the general right of a landowner by digging in his own land to abstract underground water from his neighbour's land the case where, by such abstraction, he withdraws water supporting his neighbour's land.

Moreover, Tindal C.J., when in his judgment discussing the question why the law governing streams flowing in natural course over the surface of land should be different from the law relating to underground water, points out (3) that "there is no limit of space within which the claim of right to an underground stream can be confined"; and that in the case before the Court the nearest coal-pit was at a distance of half a mile from the well, and that it was obvious that the law must equally apply if there was an interval of many miles. This reasoning of the Chief Justice seems equally cogent when the result of the abstraction of the underground water is to withdraw the support of water from neighbouring land.

When the result of digging is to withdraw land-support, whether subjacent or lateral, from neighbouring land, the probability of a subsidence of the neighbouring land is more

(1) 12 M. & W. 339. (2) 12 M. & W. 354.
(3) 12 M. & W. 351.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. Vaughan Williams L.J.

or less obvious, and there is a practical limit of space within which a landowner should know that he cannot dig without risk of letting down his neighbour's land; but he cannot tell at what distance the digging on his own land may operate to drain the underground springs on land of other landowners; neither does he know what underground springs there are, nor where they are situate.

The passage which I have cited of the judgment of Tindal C.J. (1) is cited with approval in the opinion of the judges which was acted on by the House of Lords in *Chasemore* v. *Richards*. (2)

This leads me to consider the case of *Chasemore* v. *Richards*. (2) The action was by a landowner and mill-owner for the loss of the use of a stream, chiefly supplied by percolating underground water not running in any defined stream, which resulted from the digging by an adjoining owner of land of an extensive well for the use of the inhabitants of the district. It was held that he had no right of action. The action therefore was for preventing the flow of the percolating water into a stream flowing through the plaintiff's land—a different thing no doubt altogether from abstracting underground and practically stagnant water from the land of another; but although the case was of a complaint of interception and diversion and not of abstraction of underground water, and depended largely on the right to the flow on to the plaintiff's land of water which in no sense could be said to be the property of the plaintiff till it arrived at his land, yet the unanimous opinion of the judges and the opinion of the individual Law Lords all seem to me to recognise the right of a landowner to deal with underground water, not running in a defined stream, as he chooses, and his freedom from liability if he by dealing with it deprives the neighbouring land of the percolating water under it.

The case of *New River Co.* v. *Johnson* (3) shews clearly that the principle of *Chasemore* v. *Richards* (2) applies not only to the case of interception or diversion of percolating water, but

(1) 12 M. & W. 354. (2) 7 H. L. C. 349, 367–8.
(3) (1860) 2 E. & E. 435.

also to the abstraction of water whether percolating or already collected in a well—applies, that is, to all underground water except that flowing in a defined stream; and, as pointed out by Cotton L.J. in *Ballard* v. *Tomlinson* (1), the effect of *Chasemore* v. *Richards* (2) is that every man has a right to take all the underground water going in no definite channel which he can find in his own land, notwithstanding that the effect of his doing so may be that his neighbour will have no underground water in his own land, or that the stream which he owns will be diminished in consequence of the underground water not coming into that stream; and that the owner of land has, as a natural incident to his ownership, a right to avail himself of that right to whatever extent he chooses, even though the consequence may be that he takes, not only the water which at first was under his property, but all the adjoining water which by natural force comes under his land when he has taken that which was there in the first instance.

The only case which was relied on as in any way contravening the proposition laid down in *Ballard* v. *Tomlinson* (1), (decided in 1885)—that the effect of *Chasemore* v. *Richards* (2) is that every man has a right to take all the underground water going in no definite channel which he can find in his own land, notwithstanding that by so doing he may withdraw water from his neighbour's land—is *Grand Junction Canal Co.* v. *Shugar* (3); but I do not think that that case, if carefully looked at, in any way contradicts *Ballard* v. *Tomlinson* (1), or the explanation of *Chasemore* v. *Richards* (2) given in the judgments in that case.

With regard to *Grand Junction Canal Co.* v. *Shugar* (3), it seems tolerably clear from the longer report of this case in the *Law Times* (4), that Lord Hatherley treated the case as one in which there was a direct *tapping* of an overground stream flowing in a defined channel, and not merely a *withdrawal* of percolating underground water indirectly affecting the underground stream. The observations and findings of Lord Hatherley as to the constant correspondence of the levels

(1) 29 Ch. D. 115, 123.
(2) 7 H. L. C. 349.
(3) L. R. 6 Ch. 483.
(4) 24 L. T. 402.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. Vaughan Williams L.J.

of the water in the stream and the defendants' sewer—the level of the water in which sewer varied by reason of a leak in the sewer—shew that this was his view. I doubt whether Lord Hatherley really used the expression "support of water." I observe that the word which in the *Law Times* report he is reported as using is "supply," and not "support." The idea of the support of water by water seems to me inconsistent with the *unity* of water; and whichever report of the case you take, I think that the true effect of the judgment in *Grand Junction Canal Co.* v. *Shugar* (1), as being a decision that on the facts of that case there was a withdrawal directly of water from a defined channel, is indicated by the following passage: "I do not think *Chasemore* v. *Richards* (2), or any other case, has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate underground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all."

North J., in *Bradford Corporation* v. *Pickles* (3), in dealing with *Grand Junction Canal Co.* v. *Shugar* (1), says, "But, as I read that case, it was one in which subterranean water had passed into a defined channel, from which it was subsequently abstracted, and in that respect it differs from the present case"; and the judgments of Lord Herschell and Lindley L.J. seem to me in effect to affirm this view of the meaning of this decision in *Grand Junction Canal Co.* v. *Shugar*. (1)

In *Rigby* v. *Bennett* (4) I do not think any question of right of water-support was raised; but even assuming that the facts admitted of such a question being raised, the plaintiff did not base his claim to support on any common law right, but on an implied grant or obligation arising from the fact that the corporation, the predecessors in title of the defendant, sold to

(1) L. R. 6 Ch. 483, 487.
(2) 7 H. L. C. 349.
(3) [1894] 3 Ch. 53, 70.
(4) 21 Ch. D. 559.

the plaintiff on the terms that he should build the house which he did build, and therefore could not so deal with the land which they kept as to let down the house, as this would be to derogate from their own grant. The argument of Mr. Upjohn in the present case was based entirely on the following interlocutory observations of Jessel M.R. (1): "A man generally may drain his own land and may make excavations on his own land, but if he is debarred from doing one to the prejudice of the grantee, why may he do the other?" This no doubt was intended as a criticism on the decision in *Popplewell* v. *Hodkinson* (2), but it is merely an interlocutory observation, and it seems to me that, in addition to the answer given by counsel based on *Chasemore* v. *Richards* (3), there are other reasons to which I call attention why a distinction should be drawn between the withdrawal of water and the withdrawal of land-support.

The question of the right of water-support was also raised in *Shelfer* v. *City of London Electric Lighting Co.* (4), and Kekewich J. decided in favour of the right. *Popplewell* v. *Hodkinson* (2) was cited to him, but he did not in any way question the effect of that case as deciding against the common law right, for he says (5): "The case cited on this point is *Popplewell* v. *Hodkinson* (2); but, as was pointed out by Mr. Warmington, that case does not depend on grant. Here I have a case of grant."

The three cases of *Grand Junction Canal Co.* v. *Shugar* (6), *Rigby* v. *Bennett* (7), and *Shelfer* v. *City of London Electric Lighting Co.* (4) are the only cases which Mr. Upjohn relies on as inconsistent with *Popplewell* v. *Hodkinson* (2), assuming it to decide, as I think it clearly does, that there is no right of support by water. Further, there is no case in which the right of support from water has ever been affirmed. If the right existed, one would have thought that in the vast mining operations in this country it must not infrequently have been

(1) 21 Ch. D. 563–4.
(2) L. R. 4 Ex. 248.
(3) 7 H. L. C. 349.
(4) [1895] 1 Ch. 287.
(5) Ibid. 301.
(6) L. R. 6 Ch. 483.
(7) 21 Ch. D. 559.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. Vaughan Williams L.J.

infringed, and yet there is no trace of a successful action for the infringement of such a right.

In the case of withdrawal of water-support of the surface of one property by dealing with subterranean water subjacent to another property, the owner so dealing with water under his own land is, apart from some obligation to afford support to adjoining land—apart, that is, from some natural or conventional servitude—entitled to excavate his own land in the manner in which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining land.

It is an incident of the ownership of land that the owner should be entitled to dig it, even though digging it may prejudice his neighbour's land. To limit this right there must be imposed upon the land either some natural servitude, or circumstances raising an inference of a grant to the owner of other land of a right restricting the full use by the grantor of his own land.

The case of *Smith* v. *Kenrick* (1) is a striking affirmation of this incident of the ownership of land. The plaintiff there complained of the influx and not of the withdrawal of subterranean water; and in effect the Court held that if a landowner, by lawful digging on his own land, permits a larger quantity of water than theretofore to flow on to the adjoining land, he is not liable to be sued by the owner of the land on which the water has flowed; and if it be true that a man who by, say, an improved system of drainage, causes an excess of water to flow upon the lands of his neighbour upon a lower level is not liable to an action, it would be curious if a man who by an improved system of drainage causes a deficiency of water on his neighbour's land should be liable to an action. In fact, the case of *Chasemore* v. *Richards* (2) is an authority to the contrary, so far as merely causing the deficiency is concerned. But it is said that an action will lie if the causing the deficiency of water results in a withdrawal of support afforded by subjacent water to the surface of neighbouring land. This, in a case where the act complained of is that a man by draining his own land

(1) (1849) 7 C. B. 515. (2) 7 H. L. C. 349.

has drained his neighbour's, is to assert, not a right to the support of surface-land by water situate in land laterally adjoining, but a right of support of water by water, which is to ignore the unity of water. The reasoning upon which the claim to water-support for the surface of land, whether by subjacent water or by water laterally adjacent to subjacent water (in other words, by a body of water subjacent to two properties), is based, is upon a general proposition that land must have the support of the subjacent and laterally adjacent strata to whatever extent the presence of those strata is requisite for its stability; and it is said that this reasoning applies equally whether the stratum consists of soil or partly of soil and partly of water; but it seems to me that the right of support by water to soil does not depend upon the same considerations as the right of support by soil. I say this quite apart from the difficulty of applying the term "support" at all in the case of a body of water lying under two properties, and a complaint of a withdrawal of water-support by the flow occasioned by tapping the water on the adjoining land. It is to be remembered that the right of support from adjoining property is, in all cases, an exception from or limitation of that incident of the ownership of land which entitles a man to deal with his land in the manner most beneficial to himself—that the line between incidents of ownership and the exception in favour of neighbouring owners must be drawn in accordance with the convenience of the community. To lay down a general rule that there is a right to have soil supported by neighbouring soil is to lay down a rule which generally will not interfere to any considerable extent with the beneficial enjoyment of the servient tenement.

The right of support from neighbouring soil which the convenience of society requires that landowners should enjoy and accord inter se is a right which generally will not be invaded unwittingly, for the subsidence of neighbouring land which results from digging or excavation by the owners of adjacent land can generally be predicted. The obligation of a landowner to afford support is therefore definite and limited, but an obligation not to withdraw water-support from under your

C. A. 1899 — JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. — Vaughan Williams L.J.

neighbour's land by digging or excavation in your own land is an obligation which may well be unwittingly contravened. It cannot be predicted with any certainty what effect the withdrawal of water from under neighbouring land may have on the maintenance of the level of its surface; and especially will this be difficult to predict in cases where the support afforded by water only consists in the maintenance, by the equal pressure of the water, of the soil subjacent to the surface in a state of equilibrium. It is practically impossible in such a case to predict at what point or at what distance the withdrawal of the equal pressure of the water may cause motion or subsidence in the soil previously affected by water pressure.

To affirm the right of support is to affirm that no land can be drained or well or trench dug without the risk of an action for letting down the surface of neighbouring land. I cannot persuade myself that such a right is for the interests of society or essential to the beneficial ownership of land; and, if the right is based upon an implied grant supposed to be made when lands belonging to one proprietor were divided by him between two or more other persons, it seems going very far to invent obligations in respect of unknowable and changing subject-matter like underground water.

On the whole, I think that both the decided cases and the reason of the thing negative the right of support by water, and this conclusion is fortified by the absence of any affirmation of such a right in the English authorities and text-books, and by the terms in which the right of support is dealt with in the Roman law. I think, therefore, that the defendants should succeed as to so much of the case as claims damages in respect of the subsidence.

As to the claim for obstruction of light, there is, both as to this and as to the claim for subsidence, a defence set up based on the statutory authority of the defendants to construct the gas-works in question. The plaintiff replies that, even if the defendants were authorized by statute to construct these works, yet they cannot rely on this defence because the statutes on which they rely contain a provision that nothing in those Acts shall exonerate the undertakers from any indictment, action,

or other proceeding for nuisance, in the event of any nuisance being caused by them. Now, in my judgment, the defendants, having regard to the fact that the gasholder was erected on land specified in the special Act as land on which gasworks might be erected, could have relied on the principle of the decision in *London, Brighton and South Coast Ry. Co.* v. *Truman* (1) as a complete defence to this action, were it not for the provisions in the statutes under which the defendants derive authority, that nothing in those statutes shall exempt the undertakers from indictment, action, or other proceeding.

The sections in the Acts relied upon by the plaintiff are s. 29 of the Gasworks Clauses Act, 1847, s. 53 of the special Act of 1867, and s. 9 of the Gasworks Clauses Act, 1871.

I think that the 29th section of the Act of 1847 only relates to nuisances in the making or supplying of gas. I think that s. 53 of the special Act is merely intended to guard against any contention that the power given to the company to use patents for improvement in gas exonerated them, in the use of such patents, from the operation of s. 29 of the Gasworks Clauses Act, 1847.

If this view is right, it would seem that up to 1871 gaswork undertakers were not liable for nuisances caused by the erection of works authorized by statute; but it is said that by s. 9 of the Gasworks Clauses Act, 1871, the undertakers are in future to be liable for nuisances caused by the erection of such buildings.

Now the words of s. 9 are, "nothing in this or the special Act shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them."

These words are certainly very general and, unless something can be found in the Act to limit or cut them down, would clearly, in my opinion, debar the defendants from successfully setting up the statutory authority, within the principle of the *London, Brighton and South Coast Ry. Co.* v. *Truman*. (1)

The only thing which I can find in the Act to cut down the generality of the words of s. 9 is to construe it as a proviso of

(1) 11 App. Cas. 45.

C. A. 1899 JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. Vaughan Williams L.J.

s. 5. Sect. 5 introduces a new provision in regard to the manufacture of gas and gas products. It prohibits such manufacture except on lands described in the special Act, and provides further that the undertakers shall not store gas, except upon those lands, without the previous consent in writing of the owner, lessee, and occupier of every dwelling-house within 300 yards of the limits of the site where such gas is intended to be stored. Sect. 9 might have been introduced as a proviso to s. 5 to negative any contention that, if gas or gas products were manufactured on lands described in the special Act, s. 29 of the Act of 1847, rendering the undertakers liable for nuisances in the making of gas, had no application. This may have been the intention of the Legislature, but I do not think that the Legislature has so expressed the intention as to justify cutting down the natural meaning of the words of s. 9 of the Act of 1871.

It only remains to deal with the contention of the defendants that in respect of the obstruction of light an injunction should not have been awarded, but damages.

I confess that I think this is a case in which it would have been right to award damages if the Court had a discretion to choose the remedy which would be most likely to work out substantial justice between the parties. For in this case the defendants have not committed or continued a nuisance with the purpose of compelling the plaintiff to sell. The case is not one in which the plaintiff is being disturbed in the occupation of business premises or the enjoyment of his dwelling-house. The cottages are let to weekly tenants and, as far as the plaintiff is concerned, are a mere investment of money. Moreover, I cannot entirely leave out of consideration that the plaintiff, as owner of houses situated within 300 yards of the limits within which works are intended to be constructed, had, under the standing orders of Parliament, notice that the bill which resulted in the special Act asked for authority to erect gasholders, etc., on the lands shewn on the deposited map.

This, of course, is not notice of an intention to erect a gasholder at the spot where, or of the height which, the gasholder was in fact erected; but I take it that the effect of the notice

was to give those who received it a locus standi to ask for such conditions as they thought fit. The defendants may well have supposed that, no objection having been made, they had a right to erect any gasholder which was reasonably necessary for the supply of gas to the district at any spot within the limits of those lands on which Parliament had by the Act of 1873 authorized the erection of gasholders and other buildings, especially as at the time of the passing of the Act the plaintiff had no ancient lights, nor right to have the light to windows unobstructed.

I mention these circumstances to emphasize the fact that the defendants were not deliberate wrong-doers seeking by a money payment to carry through a wrong. I however agree with the rest of the Court that it is difficult in this case, consistently with the principles laid down in *Shelfer* v. *City of London Electric Lighting Co.* (1), to refuse an injunction and award damages in lieu of an injunction.

Shelfer's Case (1), however, does not say that, whenever a plaintiff's legal right is infringed and further infringement is intended to a material extent, the plaintiff is entitled to an injunction ex debito justiciæ, and that the Court has no discretion in the matter. On the contrary, *Shelfer's Case* (1) really affirms the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, although such jurisdiction ought not to be exercised except under very exceptional circumstances.

The present Master of the Rolls and A. L. Smith L.J., both of them, without attempting a hard and fast definition, suggest examples of such special circumstances. The Master of the Rolls takes, as an example, a case in which the plaintiff has shewn that he only wants money. This must generally be difficult to prove, but ought not to be impossible to prove, in a case where the defendants have not acted oppressively, and the plaintiffs have only a money interest, that is, an investor's interest, in the property affected by the infringement of the legal right. I cannot help thinking myself that the high-handed conduct proved against wealthy defendants in some of the

(1) [1895] 1 Ch. 287.

C. A. 1899 — JORDESON v. SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY. — Vaughan Williams L.J.

injunction cases brought before the Courts have had a tendency to limit somewhat unduly the practice of the Courts in the exercise of the discretion to award damages in lieu of an injunction. It is true that Lord Cairns' Act had for its object to avoid the necessity of sending a plaintiff to the common law courts in a case where damages were the proper remedy; but it still remains the fact that an injunction should only be awarded to those whose conduct entitles them to the interference of a court of equity. (1)

Solicitors: *Collyer-Bristow, Russell, Hill & Co., for Stamp, Jackson & Birks, Hull; Jaques & Co., for Samuel Wright & Co., Bradford; Bell, Brodrick & Gray, for Laverack & Son, Hull.*

(1) On July 8, 1899, subsequently to the decision in the above case, a considered judgment was given by the Judicial Committee of the Privy Council in *Trinidad Asphalt Co.* v. *Ambard*. In that case the plaintiffs and defendants were respectively the owners of adjoining lots of "pitch-land" in the island of Trinidad, containing, at a few feet below the surface, a natural stratum of asphaltum or pitch. The defendants proceeded to excavate their lot, including the pitch under it, the excavation being made close up to the boundary of the plaintiffs' lot, the result of which was that the edge of the stratum of pitch on that lot, being exposed to the heat of the atmosphere, began to melt. The pitch thus oozed out, and either fell into the defendants' excavation or was shaved off by them. The consequence of this abstraction of the pitch from the plaintiffs' lot was that the surface of it began to sink and crack. For this injury the plaintiffs sued the defendants in the Supreme Court of Trinidad for an injunction and damages. In the arguments before the Judicial Committee on two consolidated cross-appeals, *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248, was relied upon by the defendants; but in delivering judgment their Lordships considered it unnecessary for the decision of the case to discuss the question as to the right of support from subterranean water, because the substance in question which afforded support was not water. As was laid down, said their Lordships, by the Court of Queen's Bench in *Humphries* v. *Brogden*, 12 Q. B. 739, the nature of the strata must be immaterial: it was impossible for the Court to measure out degrees to which the right of support for the surface might extend. "The only reasonable support," as Lord Campbell observed, 12 Q. B. 745, "is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level." Their Lordships accordingly allowed an injunction restraining the defendants from digging and winning or otherwise removing asphaltum from their lot in such a way as to destroy or seriously injure the surface of the plaintiffs' lot: with damages.—G. I. F. C.

G. I. F. C.

FRIARY HOLROYD AND HEALEY'S BREWERIES, LIMITED *v.* SINGLETON.

C. A. 1899 June 27, 28.

[1897 F. 1645.]

Lease—Option to Purchase—"Assigns"—Equitable Assignees—Possession—Notice—Waiver.

Decision of Romer J., [1899] 1 Ch. 86, reversed on the facts; the correspondence between the parties shewing that the contracting parties had proceeded on the assumption that the plaintiffs, though equitable assignees only of the lease, were entitled to exercise the option of purchase thereby given, and also shewing that the defendant, the reversioner in fee, had waived the notice required by the lease to be given of the intention to exercise the option.

APPEAL by the plaintiffs from the decision of Romer J. (1)

It is necessary to supplement the former report by stating the following additional facts, which were not fully brought to the attention of the Court below.

On January 18, 1897, the defendant's solicitors sent to the plaintiffs' solicitors an abstract of the title to the beerhouse, the right of pre-emption given by the lease of 1880 to Master, "his executors, administrators, and assigns," being fully set out in the abstract.

On March 1, 1897, the plaintiffs' solicitors wrote to the defendant's solicitors respecting a cottage which the plaintiffs proposed purchasing in addition to the beerhouse, the letter saying that the price seemed too high and asking whether the defendant was prepared to accept a reduced price: to which the defendant's solicitors replied, in a letter of March 2, 1897, "We think, as your clients have made a very good bargain in regard to the public-house, they might consider the price asked for the cottage certainly not excessive." On July 20, 1897, the plaintiffs' solicitors wrote to the defendant's solicitors asking for a copy of the plan on the lease of August 21, 1880, and adding that they would then send requisitions and, subject thereto, draft conveyance for approval. To which, on July 21, 1897, the defendant's solicitors replied that they could not find

(1) [1899] 1 Ch. 86.

C. A. 1899 — FRIARY HOLROYD AND HEALEY'S BREWERIES, LIMITED v. SINGLETON.

a lease of that date; adding, "We must call your attention to the last covenant in the lease under which the lessee is bound to accept our client's title."

On July 23, 1897, the defendant's solicitors wrote to the plaintiffs' solicitors inclosing a plan and asking whether a notice had been given by the plaintiffs in accordance with the lease. In their reply on the following day the plaintiffs' solicitors said that the arrangement for the purchase had been made through Mr. Singleton (the defendant's son), and that they proposed to complete the purchase within the next fortnight. Further correspondence then ensued, with the result, as stated in the former report, that the defendant declined to complete on the ground that no sufficient notice to exercise the option to purchase given by the lease had been served upon her.

Farwell, Q.C., and *Ernest E. Fletcher*, for the appellants, the plaintiffs, in addition to the cases cited by them in the Court below, referred to *Crosbie* v. *Tooke* (1), *Morgan* v. *Rhodes* (2), *Browne* v. *London Necropolis and National Mausoleum Co.* (3), *Lowther* v. *Heaver* (4), and *Cornish* v. *Abington*. (5) They also relied upon the correspondence above referred to as shewing that both parties had proceeded on the assumption that the plaintiffs, the new company, were entitled to exercise the option under the lease, and that the defendant had, in effect, waived her right to notice.

Neville, Q.C., and *L. S. Bristowe*, for the defendant, in addition to the cases cited by them in the Court below, referred to *Willmott* v. *Barber* (6), *Ramsden* v. *Dyson* (7), *In re Adams and Kensington Vestry* (8), *Horsey Estate* v. *Steiger* (9), *Earl of Darnley* v. *London, Chatham and Dover Ry. Co.* (10), *Smith* v. *Hughes* (11), *Pickard* v. *Sears* (12), *Holland* v. *King* (13), and *Dibbins* v. *Dibbins*. (14)

(1) (1833) 1 My. & K. 431.
(2) (1834) 1 My. & K. 435.
(3) (1857) 6 W. R. 188.
(4) (1889) 41 Ch. D. 248, 264.
(5) (1859) 4 H. & N. 549.
(6) (1880) 15 Ch. D. 96.
(7) (1866) L. R. 1 H. L. 129.
(8) (1884) 27 Ch. D. 394.
(9) W. N. (1899) 82.
(10) (1867) L. R. 2 H. L. 43.
(11) (1871) L. R. 6 Q. B. 597, 606–7.
(12) (1837) 6 Ad. & E. 469, 474.
(13) (1848) 6 C. B. 727.
(14) [1896] 2 Ch. 348.

[LINDLEY M.R. referred to *Burkinshaw* v. *Nicolls.* (1)]

THE COURT (Lindley M.R., Sir F. H. Jeune, and Rigby L.J.) were of opinion that it was clear that the agreement of June 25, 1895, between the old company and the new, did not in point of law constitute the new company the "assign" of the lease vested in the old company. That seemed to be borne out by *In re Adams and Kensington Vestry.* (2) But the case was really disposed of by the correspondence, the effect of which had not been fully brought to the attention of the learned judge below. Upon that correspondence the Court was now satisfied that the contracting parties had been negotiating on the assumption, which was in substance true, that the new company, the plaintiffs, were entitled to purchase the beerhouse for 450*l.*, and that the defendant was bound to sell. When the abstract was sent, setting out the covenant giving the right of pre-emption or option of purchase, nothing was said about notice, and, in fact, no importance was attached to it. It was impossible, on the correspondence, to come to any other conclusion than that the defendant had waived her right to notice. It was not until some months after December, 1896, when the negotiations for the purchase commenced, that it occurred to anybody to raise the objection that the notice required by the lease had not been given. The learned judge below had addressed himself mainly to the legal question whether the new company was an "assign," and he had attached too little weight to the correspondence, which appeared to be conclusive in favour of the new company, the plaintiffs. The appeal must therefore be allowed, with costs.

Solicitors: *Peacock & Goddard, for Capron & Sparkes, Guildford; Ingoldby & Adkin.*

(1) (1878) 3 App. Cas. 1004, 1026. (2) 27 Ch. D. 394.

G. I. F. C.

C. A.
1898
ROMER J.
Oct. 27;
Nov. 1;
Dec. 13.
C. A.
1899
June 29.

OLIVER *v.* HINTON.

[1897 O. 1398.]

Mortgage—Priority—Equitable Mortgage by Deposit of Deeds—Subsequent Purchaser for Value without Notice—Negligence—Omission to require Production of Title-Deeds.

In order that a purchaser for value, who has acquired the legal estate without notice of a prior equitable mortgage of the property, may be postponed to that mortgage, it is not necessary to shew that he has been guilty of fraud, or negligence amounting to fraud; it is sufficient that he has been guilty of negligence so gross as to render it unjust to deprive the prior mortgagee of his priority.

Observations upon *Ratcliffe* v. *Barnard*, (1871) L. R. 6 Ch. 652, 654.

A purchaser, by an agent who was not a solicitor, purchased property and obtained a conveyance of the legal estate without notice of a prior equitable mortgage by deposit of the title-deeds. The agent inquired about the deeds, and was told by the vendor that they were in his possession, but that they would not be delivered up because they related also to other property. The agent did not ask for production of the deeds, and they were not produced, nor was any abstract of title delivered. By the conveyance to the purchaser the vendor acknowledged the right of the purchaser to production of the documents of title mentioned in a schedule, and to delivery of copies, and undertook for the safe custody thereof. The documents mentioned in the schedule were the deeds which had been deposited with the mortgagee. On the subsequent discovery of the mortgage:—

Held, that under the circumstances the mortgagee was entitled to priority over the purchaser.

Decision of Romer J. affirmed.

Action to determine the priority of an equitable mortgagee by deposit of deeds and a subsequent purchaser for value without notice of the mortgage.

On June 26, 1888, Richard Canning Hill, a solicitor, deposited with the plaintiff, Caroline Ellen Oliver, widow, the title-deeds (six in number) relating to the three houses, Nos. 1, 2, and 3, Eld Cottages, and two other adjoining houses held under the same title, by way of equitable mortgage to secure the repayment of 400*l.* then due from him to the plaintiff with interest thereon. At the same time Hill gave to the plaintiff a memorandum in writing of the deposit, and an undertaking

that he would upon her request execute to her a legal mortgage of the property for securing to her repayment of the 400*l.* and interest.

On May 10, 1890, Hill executed a conveyance of the three houses, Nos. 1, 2, and 3, Eld Cottages, to the defendant Mary Ann Hinton (then Mary Ann Veness, spinster) in fee simple in consideration of 320*l.* paid by her to him.

By the conveyance Hill acknowledged the right of the defendant "to production of the documents of title mentioned in the schedule hereto and to delivery of copies thereof," and undertook for the safe custody thereof.

The deeds mentioned in the schedule were in fact the six deeds which had been deposited by Hill with the plaintiff, and they were at the date of the conveyance still in her possession. At the time of the purchase and conveyance the defendant had no notice of the plaintiff's security. The defendant did not employ a solicitor in the matter of the purchase. The purchase was negotiated and carried out on her behalf by one Thomas Price, who had been formerly a solicitor's clerk. He acted as the defendant's agent in the matter of the purchase and conveyance. He was examined as a witness in this action, and he stated that he asked Hill about the title-deeds to the houses, and Hill told him that they were in his possession, but that they would not be delivered up to the purchaser because they related also to other property. Price admitted that he did not ask Hill to produce the deeds, but that he relied upon Hill. The deeds were not in fact produced, and no abstract of title was delivered. The defendant did not pay the whole of the purchase-money to Hill at once, but it was arranged that 86*l.* of it should remain upon mortgage of the houses, and accordingly on May 10, 1890, immediately after the execution of the conveyance to her, the defendant executed a legal mortgage of the three houses to Hill to secure the payment to him of the 86*l.* with interest.

In the year 1895 the 86*l.* had been paid, with interest, by the defendant to Hill, and he delivered up to her the conveyance and the mortgage deed of May 10, 1890, but he did not reconvey the legal estate to her.

C. A. 1899 OLIVER v. HINTON.

On March 7, 1896, Hill, who then owed to the plaintiff various sums of money, secured upon a number of equitable mortgages by deposit of the title-deeds of various properties, executed a consolidation mortgage deed whereby (inter alia) he conveyed to the plaintiff the legal estate in the three houses, Nos. 1, 2, and 3, Eld Cottages, by way of mortgage to secure the payment to the plaintiff of an aggregate principal sum of 5685*l.*, with interest thereon.

On October 11, 1897, the plaintiff, who had then become aware of the conveyance by Hill to the defendant, issued the writ in this action.

The defendant had married and become a widow. She was in possession or receipt of the rents of the three houses.

The plaintiff claimed a declaration that she was entitled as against the defendant to the three houses, Nos. 1, 2, and 3, Eld Cottages, as being comprised in the consolidation mortgage of March 7, 1896, by way of security for all the principal moneys, interest, and costs remaining due to her thereon, and consequential relief.

The action came on for hearing before Romer J. on October 27, 1898.

Levett, Q.C., and *J. B. Matthews*, for the plaintiff, referred to *Lloyd's Banking Co.* v. *Jones* (1); Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.

Cavanagh, for the defendant, cited *In re Cousins* (2); Sugden's Vendors and Purchasers, 14th ed. p. 767; *Hewitt* v. *Loosemore* (3); *Plumb* v. *Fluitt* (4); *Evans* v. *Bicknell* (5); *Agra Bank* v. *Barry* (6); *Maxfield* v. *Burton* (7); *Northern Counties of England Fire Insurance Co.* v. *Whipp* (8); *Garnham* v. *Skipper* (9); *Harpham* v. *Shacklock* (10); *Mumford* v. *Stohwasser* (11); White and Tudor's Leading Cases, 7th ed. vol. ii. pp. 116, 122; *Taylor* v. *Russell* (12); *Heath* v. *Crea-*

(1) (1885) 29 Ch. D. 221.
(2) (1886) 31 Ch. D. 671.
(3) (1851) 9 Hare, 449.
(4) (1791) 2 Anstr. 432.
(5) (1801) 6 Ves. 174, 190.
(6) (1874) L. R. 7 H. L. 135.
(7) (1873) L. R. 17 Eq. 15.
(8) (1884) 26 Ch. D. 482.
(9) (1885) 55 L. J. (Ch.) 263; 34 W. R. 135.
(10) (1881) 19 Ch. D. 207.
(11) (1874) L. R. 18 Eq. 556.
(12) [1892] A. C. 244.

lock (1); *Brown* v. *Stedman* (2); *Espin* v. *Pemberton* (3); *Ratcliffe* v. *Barnard* (4); *Manners* v. *Mew*. (5)

Levett, *Q.C.*, in reply, referred to *Jackson* v. *Rowe* (6); *Rooper* v. *Harrison*. (7)

1898. Dec. 13. ROMER J. The plaintiff is an equitable mortgagee of five houses by deposit of the title-deeds accompanied by a written memorandum of deposit and undertaking by the mortgagor upon request of the plaintiff to execute a legal mortgage. The defendant is a subsequent purchaser for value from the mortgagor of three of the houses without actual notice of the prior charge, and she acquired the legal estate at the time of her purchase. The first question is whether or not under the circumstances the defendant, on becoming the purchaser, acquired a title freed from the plaintiff's charge. Now, the circumstances under which the defendant acquired her title are shortly as follows: She employed no solicitor, and personally took no part in the matter of the purchase, but left it to be carried out by a Mr. Price, who was formerly a solicitor's clerk, as her agent. No inquiry of any kind was made by the defendant or her agent as to the title of her vendor. No abstract of title was called for or supplied. Mr. Price says that he made some inquiry as to the documents of title, and was told by the vendor that he had them, but that they related to other property as well as to the three houses, and he should not hand them over, but would enter into a covenant to produce them. Having regard to the lapse of time, and to the fact that the vendor is of unsound mind and cannot give evidence, and looking at the fact that Mr. Price, on being asked on cross-examination to state precisely what he said about the title-deeds, answered that he inquired about "the documents" without saying what documents, and seeing that the vendor was to have a mortgage for part of the purchase-money, and so retain the conveyance to the purchaser and other documents, I am not satisfied that Mr. Price's

(1) (1874) L. R. 10 Ch. 22.
(2) (1896) 44 W. R. 458.
(3) (1859) 3 De G. & J. 547.
(4) L. R. 6 Ch. 652, 654.
(5) (1885) 29 Ch. D. 725.
(6) (1826) 2 S. & S. 472.
(7) (1855) 2 K. & J. 86.

C. A. 1899 OLIVER v. HINTON. Romer J.

memory can be relied upon so far as he represents that he made a direct inquiry after the title-deeds, and that the vendor replied that he had them, though I am satisfied that Mr. Price was not stating in the box anything that he did not at the moment believe. But in any point of view, it is clear that Mr. Price never asked and did not know what the documents of title were, and never asked to see them, and no document of any sort was produced before completion, or handed over when the purchase-money was paid and the conveyance executed. Under these circumstances, even assuming all that Mr. Price says to have been proved to my satisfaction, it appears to me on the authorities that I ought not to hold that the defendant acquired a title to the three houses freed from the plaintiff's mortgage. In *Wilson* v. *Hart* (1) Turner L.J. says (2): "It cannot, I think, be denied that generally speaking a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire."

Now undoubtedly in the present case the prior charge of the plaintiff was part of the title, and should have appeared in the abstract. But it is argued that I ought to hold under the circumstances that the vendor, if he had been called upon to shew his title and deliver an abstract, would have withheld all reference to the prior charge. I decline so to hold. And, moreover, even if the equitable charge had been omitted from the abstract, yet, had the purchaser, according to the usual and proper course, asked for production of the deeds to compare with the abstract, the fact that the deeds were not in the vendor's possession must have appeared. As to this, it is also suggested on behalf of the defendant that I ought to hold under the circumstances that if the vendor had been called upon to produce the deeds for the purpose of verifying the abstract, he would have given some false answer which might have excused the purchaser from further inquiry as to them. I decline so to hold. And I may refer to what was said by Romilly M.R. in *Jones* v. *Williams* (3): "With respect to the

(1) (1866) L. R. 1 Ch. 463. (2) L. R. 1 Ch. 467.
(3) (1857) 24 Beav. 47, 62.

argument, that it was unnecessary to make any inquiry because it would have led to no result, I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones* v. *Smith* (1), that a false answer, or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry, but I think it impossible, beforehand, to come to the conclusion, that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, viz., a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say." In support of the proposition that in a case like the present, where no inquiry as to title is made and no production of the deeds is asked for, the purchaser or mortgagee acquiring the legal estate cannot claim in priority to a prior equitable mortgagee, I may refer to the following cases. *Worthington* v. *Morgan* (2) is in substance identical with the case before me, the only distinction being that there no inquiry at all was made as to title or the deeds, while here, according to Mr. Price, a general inquiry was made about the deeds, but no endeavour made to ascertain what they consisted of or to have them produced. *Peto* v. *Hammond* (3) is also in point, for there a purchaser had neglected to call for the production of a title-deed of which he had notice, and he was held to take subject to a prior equitable mortgage by deposit of that deed. It would indeed be strange if a purchaser who has an abstract delivered and neglects to call for production of the deeds there appearing, should be considered in a worse position than a purchaser who calls for production of no title-deed whatever because he knows nothing about the title and makes no inquiry as to it. I may also refer to *Maxfield* v. *Burton* (4), and I think the wording of s. 3 of the Conveyancing Act, 1882, shews that the view of the law I have expressed is correct, though I agree that that section was not intended to alter the law in any way to the prejudice of a purchaser. None of the cases cited on behalf of the defendant appear to me to militate against the

(1) (1841) 1 Hare, 43.
(2) (1849) 16 Sim. 547.
(3) (1861) 30 Beav. 495.
(4) L. R. 17 Eq. 15.

C. A. 1899 OLIVER v. HINTON. Romer J.

conclusion I have arrived at. In several of them there was really no question of investigation of title at all, but merely a question as to some deed or deeds not being produced or handed over to the purchaser or mortgagee after a reasonable excuse had been given to him for not complying with his request for production or delivery. In *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1) the Court was not considering and had not to deal with a case like that before me, and Fry L.J. in delivering the judgment of the Court naturally did not in his classification of decisions (2) deal in terms with such a case. And *Agra Bank* v. *Barry* (3) turned on the fact that the question concerned an estate in Ireland, which is a register country. I, therefore, hold that the defendant took subject to the plaintiff's equitable charge. This view renders it unnecessary for me to consider the subsequent transactions under which the plaintiff acquired the legal estate, for though those transactions may possibly have bettered the plaintiff's original title (and under the circumstances I need not decide whether they did or not), they certainly did not injure that title.

W. C. D.

C. A.

The defendant appealed. The appeal was heard on June 29, 1899.

Cavanagh, for the defendant. It is admitted that the defendant had not any actual notice of the plaintiff's mortgage, and that there was no fraud as between the plaintiff and the defendant. The question is whether the defendant has done anything to disentitle him to the advantage which he obtained as a purchaser for value without notice who had the legal estate. The fact that the legal estate was afterwards conveyed to the plaintiff cannot under the circumstances deprive the defendant of this advantage. No consideration was given for the consolidation deed. No decision has ever gone so far as this of Romer J. A general inquiry as to the title-deeds is sufficient to rebut the charge of gross negligence. In order to deprive a man of the advantage of having the legal estate it must be

(1) 26 Ch. D. 482. (2) 26 Ch. D. 491.
(3) L. R. 7 H. L. 135.

shewn that he was guilty of such gross negligence as amounts to evidence or inference of fraud. Romer J. thought that Price was an honest witness, and he did not find that Price had made no inquiry about the deeds.

[LINDLEY M.R. referred to *Hewitt* v. *Loosemore*. (1)]

Price did not avoid all inquiry; he asked about the deeds, and was told that Hill had them.

[LINDLEY M.R. He did not ask to see them. No prudent solicitor would have been satisfied with that answer.]

A purchaser is not bound to ask for production of the title-deeds. Price inquired about the deeds, and a reasonably sufficient answer was given to him by the vendor.

[RIGBY L.J. A sufficient reason for their non-delivery, but not for their non-production.]

In *Agra Bank* v. *Barry* (2) the solicitor of a legal mortgagee did not insist on the production of the title-deeds, and yet it was held that the legal mortgagee was entitled to priority over a prior equitable mortgage of which he had no notice. The true test is not whether there has been such negligence as would render a solicitor liable to an action for negligence, but whether there has been such gross negligence as amounts to fraud. In *Plumb* v. *Fluitt* (3) it was held that a legal mortgagee, who had asked for the title-deeds, and had been satisfied with the promise of the mortgagor to bring them, had not been guilty of such negligence as would disentitle him to priority over a prior equitable mortgagee with whom the deeds had been deposited. In *Hewitt* v. *Loosemore* (1) it was held that when a bonâ fide inquiry for the deeds was made, and a reasonable excuse for their non-delivery was given, the legal mortgagee could not be postponed merely because he had not obtained the deeds. There are many other authorities to the same effect: *Espin* v. *Pemberton* (4); *Birch* v. *Ellames*. (5) In order to postpone an equitable mortgagee mere negligence may be enough, but a legal mortgagee will not be postponed unless he has been guilty of negligence amounting to fraud: *Farrand* v.

(1) 9 Hare, 449.
(2) L. R. 7 H. L. 135.
(3) 2 Anstr. 432.
(4) 3 De G. & J. 547.
(5) (1794) 2 Anstr. 427.

C. A. 1899 OLIVER v. HINTON.

Yorkshire Banking Co. (1); *Ratcliffe* v. *Barnard* (2); *Northern Counties of England Fire Insurance Co.* v. *Whipp.* (3) *Whitbread* v. *Jordan* (4) has always been regarded as going very far in imputing constructive notice, and it is commented on unfavourably in Sugden's Vendors and Purchasers, 14th ed. p. 767. Negligence is not the same thing as mala fides. It is sufficient if a man acts bonâ fide and makes some inquiry: *Jones* v. *Smith.* (5) The doctrine of constructive notice ought to be limited, not extended, because it assumes that which is contrary to the fact: *English and Scottish Mercantile Investment Trust* v. *Brunton.* (6) There is no distinction between the case of a man who asks for title-deeds and is put off with some reasonable excuse for their non-delivery to him, and the case of a man who, before he asks for the deeds, is told why they cannot be delivered up to him. In the present case all the title-deeds were disclosed in a schedule to the conveyance to the purchaser, and the vendor acknowledged, in the statutory form prescribed by s. 9 of the Conveyancing Act, 1881, the purchaser's right to production. This was a distinct representation that all the deeds were in the vendor's possession. Other authorities in favour of the appellant are *Garnham* v. *Skipper* (7); *Brown* v. *Stedman* (8); *Evans* v. *Bicknell* (9); *Tourle* v. *Rand* (10); *Ex parte Hardy* (11); *Carter* v. *Carter.* (12) If a purchaser is told that the title-deeds are in the possession of a third person, he is bound to make further inquiry: *Maxfield* v. *Burton* (13); *Hiern* v. *Mill* (14); *Jones* v. *Smith* (15); but that does not apply here. The cases upon which Romer J. relied are all distinguishable from the present case. In *Jones* v. *Williams* (16) the mortgagee did not inquire whether there were any other charges besides those of which he knew. *Peto* v. *Hammond* (17) is also

(1) (1888) 40 Ch. D. 182.
(2) L. R. 6 Ch. 652.
(3) 26 Ch. D. 482.
(4) (1835) 1 Y. & C. Ex. 303.
(5) 1 Hare, 43.
(6) [1892] 2 Q. B. 1, 700.
(7) 34 W. R. 135.
(8) 44 W. R. 458.
(9) 6 Ves. 174, 183.
(10) (1789) 2 Bro. C. C. 650.
(11) (1832) 2 D. & Ch. 393.
(12) (1857) 3 K. & J. 617.
(13) L. R. 17 Eq. 15.
(14) (1806) 13 Ves. 114, 122.
(15) 1 Hare, 61.
(16) 24 Beav. 47.
(17) 30 Beav. 495.

distinguishable. In *Worthington* v. *Morgan* (1) no inquiry was made relative to the title-deeds. A purchaser for value without notice will be protected, even if he has not got the legal estate: *Colyer* v. *Finch*. (2)

Rowden, *Q.C.*, and *J. B. Matthews*, for the plaintiff, were not heard.

LINDLEY M.R. In my opinion this case does not present any serious difficulty when once the facts are understood. The defendant has been cheated by Hill, but she has not been in any way cheated by the plaintiff. In 1888 Hill gave the plaintiff a mortgage of the three houses in question and two others. It was not a legal mortgage, but an equitable mortgage by deposit of title-deeds, accompanied by a memorandum of deposit, by which Hill agreed to execute a legal mortgage when requested by the plaintiff to do so. The plaintiff had a good equitable mortgage, and she cannot be charged with any neglect or breach of duty in not obtaining a legal mortgage. She ran, however, the risk of losing her priority in case the legal estate should be conveyed to a subsequent purchaser for value without notice of her charge. Who is it that now claims to override her charge? The only person who can do so, if he has acquired his title subsequently to hers, is a bonâ fide purchaser for value without notice of her charge. But this does not include a purchaser for value who is so grossly negligent as to take none of the ordinary precautions which ought to be taken in such a matter—who, in fact, takes no precautions whatever. He may be a bonâ fide purchaser for value without notice of a prior charge, but he is not entitled to the protection of the Court. I do not base my judgment upon constructive notice of the plaintiff's charge, nor do I mean to suggest that there was any fraud or any complicity in fraud on the part of either the defendant or her agent, Price. Price gave his evidence with perfect candour. The defendant left the arrangement of the purchase entirely to him. He inquired about the title-deeds, and was told by Hill that they were in his possession, but that

(1) 16 Sim. 547. (2) (1856) 5 H. L. C. 905.

C. A. 1899 OLIVER v. HINTON. Lindley M.R.

they would not be delivered up to the purchaser because they related also to other property. No abstract of title was asked for or delivered, and no further inquiry was made. Price in his evidence admitted that he made a mistake in not asking to see the deeds, but said that he relied upon Hill. Can a person whose agent acted in this way be regarded as a bonâ fide purchaser for value without notice who is entitled to the protection of the legal estate? To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgagee of her priority would be the greatest injustice. None of the cases which have been cited really assist the defendant, with the exception of *Ratcliffe* v. *Barnard*. (1) The actual decision in that case was, I think, perfectly right. But I think that James L.J. went too far in the language which he used. He said (2): "Turner L.J. has, in *Hunt* v. *Elmes* (3), expressed the only principle upon which in this Court a man will have his legal security taken away. He must have been guilty of fraud or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud. If a man abstains from inquiry under such circumstances that the Court will infer that he abstained in order to deprive himself of knowledge, then he will not be allowed to hold the property merely because he did not inquire." I am not prepared to go to that length, and I do not think that what James L.J. said is justified by the case of *Hunt* v. *Elmes* (3), to which he referred. In that case, and also in *Hewitt* v. *Loosemore* (4), it was said that to deprive a man of the protection of the legal estate he must have been guilty of either fraud or gross and wilful negligence. To deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority.

The appeal must be dismissed.

(1) L. R. 6 Ch. 652.
(2) Ibid. 654.
(3) (1860) 2 D. F. & J. 578.
(4) 9 Hare, 449.

SIR F. H. JEUNE. I am of the same opinion. I have endeavoured to discover the principle underlying the cases referred to. Cases of this kind depend upon mixed fact and law; but, so far as I understand them, I think the principle is that in order to deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate there must have been gross negligence on his part. The observations of James L.J. in *Ratcliffe* v. *Barnard* (1) seem to shew that he thought there must have been either fraud on the part of the purchaser or negligence so gross as to lead the Court to infer fraud on his part. In the present case there has been no fraud on the part of the defendant; there has only been gross negligence in the ordinary sense of the words. But we must look at the judgment of James L.J. in the light of the other cases, and I think they shew that what he meant was not such conduct as would entitle a jury or a judge at common law to find that there had been actual fraud, but negligence so gross as would justify the Court of Chancery in concluding that there had been fraud in an artificial sense of the word—such gross negligence, for instance, as omitting to make any inquiry as to the title to the property. In that sense of the word, I think, there has been in the present case on the part of the defendant negligence so gross as would have led the Court of Chancery to impute fraud of that kind to her. I do not mean to suggest that there was any fraud in fact. But the defendant's negligence was so gross as to disentitle her to be treated as a bonâ fide purchaser for value without notice of the plaintiff's charge.

RIGBY L.J. I am of the same opinion. I so entirely concur in what has been said by Lindley M.R. and Sir F. H. Jeune that I will not repeat it. I will only say that most of the authorities which have been cited as favourable to the appellant are really against her. In many of them it is said that if a purchaser makes inquiries and receives an answer with which he ought reasonably to be satisfied, he is excused from making further inquiries. Most of the cases relate to the delivery up of title-deeds. But the answer with which the purchaser may

(1) L. R. 6 Ch. 652.

C. A. 1899 OLIVER v. HINTON. Rigby L.J.

rest satisfied must be an answer to the question which under the circumstances it was reasonable that he should ask. In the present case Price ought to have asked, not for the delivery of the title-deeds, but for their production. When he was told that the vendor had got the deeds he did not (as he ought to have done) go on to say, "Let me see them." I do not mean to say that, if he had done so, the vendor might not then have given him an answer which he could reasonably have accepted. But no such answer was given, because the question was never put. The vendor was never asked to produce the deeds. As regards the observations of James L.J. in *Ratcliffe* v. *Barnard* (1), which have been referred to, the Court is not bound to treat the mere language used by a learned judge in the particular case with which he was dealing as laying down a principle of law governing other cases. In the present case no proper inquiry was made by the defendant's agent, and it is, in my view, just the same thing as if he had made no inquiry at all about the deeds.

Solicitors: *Timbrell & Deighton, for Dobbs & Hill, Worcester; A. Hunt, for R. A. Essex, Worcester.*

(1) L. R. 6 Ch. 654.

W. L. C.

STOKE PARISH COUNCIL *v.* PRICE.

NORTH J.
1899
May 10, 11.

[1898 S. 1522.]

Local Government—Parish Council—Right to Sue—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 8, *sub-s.* 1 (*e*), (*i*).

A parish council cannot in their own name without the Attorney-General maintain an action to enforce a right of the inhabitants of the parish to the use of a well or spring of water.

TRIAL OF ACTION.

The plaintiffs were the parish council of the rural parish of Stoke, in Kent, elected under the Local Government Act, 1894.

The plaintiffs alleged by their statement of claim that through the parish there ran a main road, leading from Upper Stoke to Middle Stoke, the road being a public highway which had been from time immemorial dedicated to the public and repairable by the local authorities. On a strip of land abutting on the north side of the highway, and forming part thereof, there was, and always had been from time immemorial, a certain spring or well, and the inhabitants of the parish were entitled to the free use of the spring or well for the purpose of drawing water therefrom, and for this purpose to have free access thereto. The parishioners were entitled to this right (*a*) by a lost grant; (*b*) by enjoyment as of right from time immemorial; (*c*) by the uninterrupted and continuous enjoyment thereof for a period of twenty years prior to the wrongful acts thereinafter complained of.

The use of the spring or well was of great importance to the inhabitants of the parish, and afforded one of the chief sources of their water supply. The plaintiffs, in exercise of the powers for that purpose conferred on them by the Act, utilized the spring or well, and provided facilities to the parishioners for obtaining water therefrom, and in the execution of the works necessary for this purpose they placed concrete round the edge of the spring or well, and erected a pump.

The defendant was the owner or occupier of land adjoining the highway, and in November, 1897, and again in January,

NORTH J. 1899 STOKE PARISH COUNCIL v. PRICE

1898, he wrongfully interfered with the spring or well and injured the pump, thereby preventing and obstructing the inhabitants of the parish from using the water, and preventing the plaintiffs from utilizing the spring or well for the benefit of the inhabitants.

The plaintiffs claimed—

(1.) A declaration that the inhabitants of the parish were entitled to the free use and enjoyment at all times of the spring or well, and for that purpose to have access thereto and take water therefrom.

(2.) An injunction restraining the defendant, his servants &c., from blocking up, obstructing, damaging or in any way interfering with the pump used for pumping water from the spring or well, and from interfering with, obstructing or damaging the spring or well, and from doing any other act, matter or thing whereby the plaintiffs might be prevented from utilizing the spring or well for the benefit of the inhabitants of the parish.

(3.) Damages for trespass to the pump.

By his defence the defendant denied most of the allegations of the plaintiffs, and he said that "the plaintiffs have no title to bring this action for the declaration claimed in paragraph 1 of the claim, or for the assertion of the rights of the public referred to in paragraph 2 of the claim, and any such claim can only be brought in the name of the Attorney-General."

Buckmaster, for the plaintiffs. As to the objection that the action ought to be brought by the Attorney-General, no doubt proceedings to enforce a public right must be brought through the Attorney-General: *Bermondsey Vestry* v. *Brown*. (1) But, when there is a right in the inhabitants of a particular district, the public authority of the district, or even one individual inhabitant on behalf of the rest, can sue to enforce the right. *Manning* v. *Wasdale* (2) and *Race* v. *Ward* (3) shew that such a right as is claimed may exist in the inhabitants, if not by prescription at any rate by custom.

(1) (1865) L. R. 1 Eq. 204. (2) (1836) 5 Ad. & E. 758.
(3) (1855) 4 E. & B. 702.

If there is this right to take water, the parish council were justified in putting up the pump: *Smith* v. *Archibald*. (1) The parish council are entitled to utilize the spring under (2) s. 8, sub-s. 1, clauses (*e*) and (*i*), of the Local Government Act, 1894.

It is not alleged that the plaintiffs have exceeded their powers in what they have done, and *Smith* v. *Archibald* (1) shews that they have acted within their powers.

Morton Smith, for the defendant. The parish council are not the proper plaintiffs and cannot maintain the action. In a matter affecting a public right a local authority cannot sue in their own name. They can only sue with the sanction of the Attorney-General in his name, they being relators. Any member of the public can sue if by an interference with a public right his private right is infringed, but not otherwise. It is the function of the Attorney-General to enforce a public right; a public authority cannot do so in the absence of special damage, unless the statute creating them confers on them a power to do so: *Wallasey Local Board* v. *Gracey*. (3) The decision of Stirling J. in that case was approved by the Court of Appeal in *Tottenham Urban Council* v. *Williamson & Sons*. (4) *Bermondsey Vestry* v. *Brown* (5) is really to the same effect, and *Nuneaton Local Board* v. *General Sewage Co.* (6) is not to the contrary. And in *Smith* v. *Archibald* (1) Lord Blackburn said (7), "if any sanitary evils came from the well they"

(1) (1880) 5 App. Cas. 489.

(2) By s. 8, sub-s. 1, "A parish council shall have the following additional powers, namely, power" (inter alia)

"(*e*) to utilise any well, spring, or stream within their parish and provide facilities for obtaining water therefrom, but so as not to interfere with the rights of any corporation or person; and

"(*i*) to execute any works (including works of maintenance or improvement) incidental to or consequential on the exercise of any of the foregoing powers, or in relation to any parish property, not being property relating to affairs of the church or held for an ecclesiastical charity."

By s. 3, sub-s. 9, "Every parish council shall be a body corporate, by the name of the parish council, with the addition of the name of the parish . . . ."

(3) (1887) 36 Ch. D. 593.

(4) [1896] 2 Q. B. 353.

(5) L. R. 1 Eq. 204.

(6) (1875) L. R. 20 Eq. 127.

(7) 5 App. Cas. 517.

NORTH J. 1899 STOKE PARISH COUNCIL v. PRICE.

(the local authority) "might stop it up, just as they may any other; but the mere fact that the public of Denny had a right to use it before the Public Health Act was passed does not give the local authority the right to do anything more than the public had the right to do before." Before the Act of 1894 the inhabitants of the parish could not have sued without the Attorney-General. A parish council can "utilize" a well or spring, but they have no power to take legal proceedings in respect of it without the Attorney-General. As regards rights of way, an express power is given by s. 26, sub-s. 3, of the Act to a district council to "institute or defend any legal proceedings." No such power is given to a parish council. A parish council can only make a representation to the district council or petition the county council: see s. 26, sub-s. 4.

Buckmaster, in reply. It is not disputed that the Attorney-General is the proper plaintiff to enforce a public right. But the right which the plaintiffs are seeking to enforce is not a public right; it is a right of the inhabitants of the parish. Such a right may be possessed by a limited body by prescription, and it can be asserted by a representative body on their behalf. Before the Act of 1894 some of the inhabitants could have sued on behalf of the class. In the cases relied upon by the defendant the right which it was sought to enforce was a public right, not that of a limited class. Under the Act the power of supplying water is given to the rural district council, but the power of utilizing an existing supply is given to the parish council. This implies a right to sue if necessary. The plaintiffs in the exercise of their powers have erected a pump, which is their property, and they are entitled to sue in respect of that.

NORTH J. In my opinion the preliminary objection taken by the defendant is well founded. I cannot see any ground for saying that the Act of 1894 empowers a parish council to bring an action of this kind. Even if the plaintiffs had had power to bring the action, I think they would have acted more wisely if they had come to some arrangement with the defendant to pay him a nominal rent for the use of the water. But I do

not see what right a parish council have to sue in their own name on behalf of the inhabitants of the parish. It would be very alarming if it could. The plaintiffs' case is that the well in question forms part of a strip of land which is part of a public highway. If so, the plaintiffs have no right to the soil, and according to their own shewing it is not vested in them. They have, therefore, no right to sue as owners of the property. The only question is whether they have any right to sue under the provisions of s. 8, sub-s. 1, clauses (*e*) and (*i*), of the Act of 1894. The powers conferred on a parish council by clause (*e*) are "to utilise any well, spring, or stream within their parish and provide facilities for obtaining water therefrom, but so as not to interfere with the rights of any corporation or person"; and by clause (*i*), "to execute any works (including works of maintenance or improvement) incidental to or consequential on the exercise of any of the foregoing powers, or in relation to any parish property, not being property relating to affairs of the church or held for an ecclesiastical charity." I can see nothing in those clauses pointing to a right to bring an action against an owner of land to prevent him from making use of it as he thinks fit. By s. 107 of the Public Health Act, 1875, much larger powers were conferred upon a local authority—namely, a power to "cause any proceedings to be taken against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance under this Act," and yet it was held by Stirling J., in *Wallasey Local Board* v. *Gracey* (1), that such proceedings must be ordinary proceedings known to the law, and that in the absence of special damage a local authority could not sue in respect of a public nuisance, except with the sanction of the Attorney-General by action in the nature of an information. This decision was approved by the Court of Appeal in *Tottenham Urban Council* v. *Williamson & Sons.* (2) The provisions of s. 107 in those cases were much stronger in favour of the right of the local authority to sue alone than are those of the Act of 1894 in the present case, and in my opinion those decisions shew that the plaintiffs cannot sue in their

(1) 36 Ch. D. 593. (2) [1896] 2 Q. B. 353.

NORTH J. 1899 STOKE PARISH COUNCIL v. PRICE.

own name without the Attorney-General. The action fails, and there is no need to go into evidence. I give judgment for the defendant with costs.

Solicitors: *Lewin & Birdseye, for Basset & Boucher, Rochester; Dollman & Pritchard, for Hayward & Smith, Rochester.*

W. L. C.

NORTH J. 1899 *June* 20.

BRISTOL TRAMWAYS AND CARRIAGE COMPANY *v.* NATIONAL TELEPHONE COMPANY.

[1898 B. 3535.]

Telephone Company—Public Street—Licence from Postmaster-General—Right to lay Wires—Power to open Street—Consent—Person liable for Repair—Tramway Company—Telegraph Act, 1863 (26 & 27 *Vict. c.* 112), *ss.* 10, 12, 13—*Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 32.

A telephone company, acting under a licence from the Postmaster-General pursuant to the Telegraph Acts, 1863, 1878, and 1892, need not obtain the previous consent of a tramway company before proceeding to break open a street or public road on which tramway lines are laid for the purpose of laying telephone wires, even though the tramway company is liable for the repair of that street or public road.

ACTION.

The object of this action, which was commenced in August, 1898, was to restrain the defendant company from interfering with, opening, or breaking up certain streets in the city of Bristol, along which the lines of the plaintiff company's tramways were laid, without the consent of the plaintiff company; but, the matters in dispute having been subsequently arranged, no injunction was asked for at the trial, though the Court had to determine the relative rights of the parties; and this raised the general question of the right of a telephone company, under a licence from the Postmaster-General, to interfere with and open a road on which there was a tramway, for the purpose of laying telephone wires, without obtaining the previous consent of the tramway company.

The plaintiff company were the owners of an extensive system

of tramways in the city of Bristol and the neighbourhood, traversing some twenty miles of streets, and had recently obtained power to extend their tramways by an addition of several miles of line, and to convert the whole of their undertaking into electric tramways. Some of the existing lines were worked by horse, others by electrical power. The particular portion of the line which had been interfered with by the defendant company had been made under the Bristol Tramways Order, 1896, which was duly confirmed by Parliament, and incorporated the Tramways Act, 1870.

By a licence from the Postmaster-General of November, 1896, the defendant company had acquired the right to establish telephonic communication in the city of Bristol, and were thereby authorized to exercise "all such powers of executing works (other than works under, in, upon, over, along, or across any railway or canal) as are conferred upon the Postmaster-General by the Telegraph Acts, 1863 and 1878, and by s. 2 (but not any other section) of the Telegraph Act, 1892."

Sects. 9, 10, and 12 of the Telegraph Act, 1863 (26 & 27 Vict. c. 112), provide that telegraph wires shall not be placed under, over, or across any street or public road without the consent of "the body having the control of such street or public road."

Sect. 13 provides that "Where any landowner or other person is liable for the repair of any street or public road (notwithstanding that the same is dedicated to the public), the company" (i.e., the company authorized by special Act to construct and maintain telegraphs) "shall not place any work under, in, upon, over, along, or across such street or public road, except with the consent of such landowner or other person, in addition to the consent of the body having the control of such street or public road, where under this Act such last-mentioned consent is required . . . ."

Sects. 3 and 4 of the Telegraph Act, 1878 (41 & 42 Vict. c. 76), provide for arbitration in case the consent of the body having the control of the streets is refused; and by s. 2 of the Telegraph Act, 1892 (55 & 56 Vict. c. 59), the Postmaster-General is empowered with the assistance of the Railway and

NORTH J.
1899
BRISTOL TRAMWAYS AND CARRIAGE COMPANY v. NATIONAL TELEPHONE COMPANY.

Canal Commission to make Provisional Orders for the construction of work on private lands.

It was admitted that all the provisions of the above Acts were equally applicable to telephones.

By the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 28, a tramway company is bound at their own expense and at all times to "maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction," so much of any road whereon any tramway belonging to them is laid, as lies between the lines of rails and eighteen inches on each side; and s. 32 provides that "Nothing in this Act shall take away or abridge any power to open or break up any road along or across which any tramway is laid, or any other power vested in any local authority or road authority . . . . or in any company, body, or person for the purpose of laying down, repairing, altering, or removing any pipe for the supply of gas or water, or any tubes, wires, or apparatus for telegraphic or other purposes, but in the exercise of such power any such local authority, road authority, company, body, or person shall be subject to the following restrictions"; then followed elaborate provisions and restrictions as to the method of carrying out any proposed operations for the due protection of tramway companies. The defendant company had obtained the consent of the corporation of Bristol as "the body having the control of the street," when an elaborate agreement was entered into protecting the corporation, and giving them a certain amount of control over the operations of the defendant company. The consent of the plaintiff company had not been obtained, the defendant company contending that it was not necessary, and that they were already sufficiently protected by the restrictions imposed by s. 32 of the Tramways Act, 1870.

There was no dispute as to the facts, and the action was tried without pleadings and upon affidavit evidence.

Cripps, Q.C., Stewart-Smith, and *Pepys,* for the plaintiff company. The effect of the licence from the Postmaster-General is to authorize the defendant company to exercise the

powers conferred on the Postmaster-General by the Telegraph Acts; and these Acts must be strictly complied with. By the Tramways Act, 1870, s. 28, the plaintiff company is made "liable for the repair" of these streets; and by the Telegraph Act, 1863, s. 13, the consent of the "person liable for the repair" of the street must be obtained in addition to the consent of the body having the control of the street. It is most important to the plaintiff company that its consent should be necessary, in order that it may be able to protect itself and have some control over the proposed works, probably by a written agreement on the same lines as that entered into with the corporation, the "body having the control of the streets." Part of these tramways are already worked by electrical power, and it is proposed to increase this method of working, so that it becomes more necessary than ever to be in a position to see that the telephone wires do not interfere with our electric power. The fact that we are only liable to repair a portion of the street does not deprive us of the benefit of s. 13. Sect. 32 of the Tramways Act, 1870, does not deprive us of the benefit of s. 13 of the Telegraph Act, 1863; s. 32 only applies to local authorities, who might otherwise be interfered with by the powers given to tramway companies. No power is vested in a telephone company apart from the licence of the Postmaster-General; s. 32 has, therefore, nothing to do with the present case.

Swinfen Eady, Q.C., and *Roskill*, for the defendant company. A tramway company is not a person "liable for the repair of a street" within the meaning of s. 13 of the Telegraph Act, 1863. It is only liable for the repair of a portion of the street, just as gas and water companies are liable to repair and make good so much of the street as is disturbed by the laying of their pipes and mains. The Postmaster-General, or his licensees, are not bound to obtain the previous consent of gas or water companies in order to lay wires and tubes under their pipes; neither is the previous consent of a tramway company necessary. "Liable for the repair" means liable for the repair of the whole street.

But if a tramway company is a "person liable for the repair"

NORTH J. 1899 BRISTOL TRAMWAYS AND CARRIAGE COMPANY v. NATIONAL TELEPHONE COMPANY.

of the streets along which its lines are laid, it is only liable by virtue of s. 28 of the Tramways Act, 1870; then comes s. 32, which says nothing in that Act is to take away or abridge any power of opening or breaking up a road vested in any company or person for the purpose of laying down tubes and wires. To hold that the previous consent of a tramway company was necessary would be abridging the powers of the Postmaster-General. The provisions at the end of s. 32 afford ample protection to a tramway company. The Postmaster-General or his licensees must comply with all these restrictions, but the previous consent of the tramway company is not necessary.

Cripps, Q.C., in reply.

NORTH J., after stating shortly the effect of ss. 9 to 12 of the Telegraph Act, 1863, and reading s. 13, and referring to the provisions for arbitration in the Telegraph Act, 1878, continued:—

The only material sections, therefore, are those to which I have just referred and the sections in the Tramways Act, 1870, which is an Act passed with reference to tramways to be constructed at any time. It applies, therefore, to any construction which took place of this tramway after the passing of this Act. [Having read s. 28, his Lordship continued:—]

That section contains one of the terms imposed upon persons making tramways under this Act; inasmuch as the laying of the trams and the use of them would interfere materially with the particular part of the public road mentioned, tramway companies were to be bound to keep it in repair under the direction of the road authority and to their satisfaction. Now, the tramway to be made in nearly every case, if not in all, is a tramway taking up part of a road and not the whole: the rest is left as it was before for the ordinary traffic. Therefore the 28th section applies as between the tramway owners (the promoters as they are called) on the one hand, and the persons, to use the words of the Act of 1863, having "the control of the street or public road" (or as the phrase is used in the Tramways Act, the road authority, meaning the same thing) on the other. Now, independently of the provision in s. 28, it is clear that there is no obligation under the Telegraph Act, 1863, to obtain

the consent of the tramway company. The Postmaster-General in this case has licensed certain works to be done under the Telegraph Acts, with respect to which no consent is necessary from the company, unless it is required by s. 28. Then the only other material section is s. 32. [His Lordship read it, and continued:—]

The question is whether consent has to be obtained from the tramway company under s. 28, as being the persons who are bound to repair that particular portion of the road. The conclusion I come to is that consent need not be obtained; and I think it is not necessary, by reason of the 32nd section of the Act. But for the 28th section, the tramway company have nothing whatever to do with mending the road; they have no obligation to repair of any kind cast upon them. It is cast upon them expressly by s. 28 of the Act; and then I think that that is one of the things referred to in the 32nd section, which says nothing in this Act shall "take away or abridge the power" (I will not read the section again) conferred by the Act for laying tubes and apparatus for telegraphic purposes; and I think the effect of it is, that the 32nd section provides that, although the tramway company has to repair, yet, notwithstanding anything contained in the Act, the company or person shall still exercise the right having regard only to the particular provisions that are laid down by that section.

Mr. Swinfen Eady referred to the position of gas and water companies as being very similar to that of the tramway company. I am not satisfied that they are. In the case of a gas or water company, it is empowered to make a trench, put in pipes, and to fill it up again; but inasmuch as their doing that has to a certain extent disturbed the roadway, they are bound to keep it good in every respect for three months, and as regards subsidence for a longer period. I am not satisfied that persons who have merely such a limited power as that can be said to be persons who are liable for the repair of a street or public road under s. 13 of the Telegraph Act, 1863. I do not think, therefore, that those cases at present are quite parallel; but the conclusion I come to is founded upon the construction

NORTH J. 1899 BRISTOL TRAMWAYS AND CARRIAGE COMPANY v. NATIONAL TELEPHONE COMPANY.

of the Tramways Act itself, particularly these two sections—28 and 32.

The result then is that, as no injunction is now required, there is nothing further to be done but to dismiss the action with costs.

Solicitors: *Warwick Webb; W. E. L. Gaine.*

W. C. D.

NATIONAL SOCIETY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS *v.* GIBBS.

COZENS-HARDY J.

1899

April 17, 18, 28.

[1896 N. 1719.]

Patent — Joint Grant — Survivorship — Covenant by Joint Owners — When construed as Several or Joint and Several.

In 1882 letters patent were granted to L. and J. in the then usual form of grant to two patentees, namely, to them, "their executors, administrators, and assigns," to the end that L. and J., "their executors, administrators, and assigns and every of them" should have and enjoy the full benefit and sole use and exercise of the patented invention. By an agreement under seal made in 1883 between L. and J. of the one part and the plaintiff company of the other part, the former agreed to sell to the latter the above-mentioned and other letters patent and patent rights, and it was provided that L. and J. should transfer to and vest the patents in the company. Clause 7 was as follows: "The assignment and transfer of the said letters patent . . . . shall be prepared by and at the costs of the said company, and shall be expressed to be made in pursuance of this agreement and in consideration of the payment of" the purchase-money, "and the said vendors and all other necessary parties, if any, shall at the cost of the said company execute such assignments to the said company, or as they shall direct, and such assignments respectively shall contain a covenant by the said vendors that all the letters patent thereby assigned . . . . are valid and in nowise void or voidable, and also such other covenants and provisions as may reasonably be required by the said company for giving effect to the sale hereby agreed to be made." L. died in 1888, and after his death an action was brought by the company against J. and the administratrix of L., claiming (1.) that the defendants might be ordered to assign the patents; (2.) damages for breach of the agreement and the warranty therein contained; (3.) repayment of part of the purchase-money on the ground that some of the patents had been declared invalid:—

Held, that the right or privilege granted by letters patent being for all purposes regarded as property, and the grant being to two persons, their executors, administrators, and assigns, only a joint interest was created, that J. took the whole interest by survivorship, and that L.'s administratrix was not a proper party to the action so far as it sought an assignment of the patent:

Held, also, that the obligation created by clause 7 of the agreement was that the assignment should contain a joint covenant only, and that L.'s administratrix was not bound to enter into any covenant.

By an agreement under seal, dated May 25, 1883, and made between Lucien Gaulard and John Dixon Gibbs (thereinafter

COZENS-HARDY J.

1899

NATIONAL SOCIETY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS v. GIBBS.

called the "vendors") of the one part and the National Society for the Distribution of Electricity by Secondary Generators, Limited—below called the company—of the other part, after reciting that the vendors were the inventors of certain inventions in connection with the manufacture and construction of secondary generators for the distribution of electricity and other apparatus connected with electrical lighting, for which they had obtained her Majesty's letters patent and of which they had filed specifications, and that the vendors had also obtained certain foreign patents, it was agreed that (1.) the vendors should sell and the company should purchase the exclusive privilege of using, exercising, and vending all the inventions within the United Kingdom and the other countries named, with the full benefit of all extensions, &c.; (2.) that "the vendors and each of them" should from time to time and at the request and cost of the company do all such acts and things as by the company might be considered necessary or expedient for procuring confirmation of any of the patents, and for obtaining extensions and prolongations, and that the vendors would communicate all improvements and other inventions, and at the request and cost of the company patent the same and execute assurances for vesting the new patents in the company; (3.) that in the event of infringement the company should "be at liberty to commence, carry on, and prosecute in their own name, or in the name of the patentees or any of them, or the executors or administrators of any of them or otherwise, all such actions and proceedings" as the company might think fit; (4.) that "the vendors and each of them" should at all times thereafter give the company advice as to the use of the inventions. Clause 5 stated the consideration payable (namely, fully paid shares in the company and cash), and clauses 6 and 7 were as follows: "(6.) The vendors shall without delay, at the expense of the said company and to the satisfaction of the solicitors of the said company, establish a title to all the said inventions and letters patent and privileges hereby agreed to be sold, and assign and transfer the same to, and cause the same to be legally vested in, the said company or such person or persons as the said company shall

appoint for the purpose. (7.) The assignment and transfer of the said letters patent and other premises sold shall be prepared by and at the costs of the said company, and shall be expressed to be made in pursuance of this agreement and in consideration of the payment of the said sum of 220,000*l.*, to be paid in fully paid-up shares and cash as before mentioned, and the said vendors and all other necessary parties, if any, shall at the cost of the said company execute such assignments to the said company or as they shall direct, and such assignments respectively shall contain a covenant by the said vendors that all the letters patent thereby assigned or any letters patent which may thus have been obtained in substitution for the same or in respect of such invention as is protected thereby are valid and in nowise void or voidable, and also such other covenants and provisions as may be reasonably required by the said company for giving effect to the sale hereby agreed to be made. Provided that the consideration money may be apportioned among two or more assignments as the said company shall think fit."

All the patents were granted to Gaulard and Gibbs, and not to either of them separately.

Amongst the patents were English letters patent, dated September 13, 1882 (4362 of 1882). By these letters patent, after reciting that Gaulard and Gibbs had by their petition represented that they were in possession of an invention for a new system of electricity for the production of light and power, believed to be of great public utility, and that they were the first and true inventors thereof, &c., and that the petitioners had prayed for a grant "unto them, their executors, administrators, and assigns of . . . . letters patent for the sole use, benefit, and advantage of the said invention" within the United Kingdom for fourteen years, a grant was made "unto the said Lucien Gaulard and John Dixon Gibbs, their executors, administrators, and assigns [of] our special licence, full power, sole privilege, and authority that they the said" Gaulard and Gibbs, "their executors, administrators, and assigns, and every of them by themselves or by their deputy, or deputies, servants, or agents, or such others as they the said" Gaulard and Gibbs,

COZENS-HARDY J.

1899

NATIONAL SOCIETY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS v. GIBBS.

"their executors, administrators, and assigns, shall at any time agree with and no others and from time to time and at all times hereafter during the term of years expressed, shall and lawfully may make, use, exercise, and vend their said invention" within the United Kingdom "in such manner as to them the said" Gaulard and Gibbs, "their executors, administrators, and assigns or any of them shall in their discretion seem meet, and that the said" Gaulard and Gibbs, "their executors, administrators, and assigns, shall and lawfully may have and enjoy the whole profit, and benefit," &c., coming by reason of the invention. "To have, hold, exercise, and enjoy the said licences, powers, privileges, and advantages . . . . unto the said Lucien Gaulard and John Dixon Gibbs, their executors, administrators, and assigns," for the term of fourteen years; "and, to the end that they the said" Gaulard and Gibbs, "their executors, administrators, and assigns, and every of them, may have and enjoy the full benefit and sole use and exercise of the said invention," all Her Majesty's subjects within the United Kingdom were commanded not at any time within the fourteen years directly or indirectly to use the invention, or counterfeit, imitate, or resemble the same, &c., "without the consent, licence, or agreement of the said" Gaulard and Gibbs, "their executors, administrators, or assigns, in writing under their hands and seals first obtained . . . . upon such pains and penalties as can or may be justly inflicted upon such offenders for their contempt of this our Royal command and, further, to be answerable to the said" Gaulard and Gibbs, "their executors, administrators, and assigns, according to law for their damages thereby occasioned."

Gaulard died in 1888, and Mme. Henriette Unesime Ruelle was his administratrix. In the present action, which was brought against Gibbs and Mme. Ruelle, the company alleged that the consideration for the sale of the patents had been paid, that the patents had not been assigned to the company, and were entirely or in part void or voidable, that in some countries the patents had been declared void, and that the company had suffered damage by having to pay costs and by the value of the patents having been reduced. The company, accordingly,

claimed—(1.) that the defendants might be ordered to assign the patents; (2.) damages for breaches of agreement and warranty; and (3.) repayment of a portion of the purchase-money. A compromise was effected with Gibbs, and the action came on for trial against the other defendant on April 17, on which day and on April 18 the preliminary points referred to below were argued.

Moulton, Q.C., and *Gore-Browne*, for the plaintiff company (in answer to the preliminary objection (1.) that the grant of letters patent was to Gaulard and Gibbs jointly, and that on the death of Gaulard the joint interest passed to Gibbs by survivorship; (2.) that the obligation created by clause 7 of the agreement was merely a joint covenant, and that the only person who could be sued on it was the survivor, Gibbs). The rights of patentees are different from those of the owners of other kinds of property. Ordinarily, letters patent give to one person the right to prevent other people doing certain things, and that right may be exercised by the patentee's executors, administrators, or assigns. When the letters patent are granted to two people, each of them can exercise the privileges granted, and the same privileges go to their executors and the executors of each of them—each has a separate privilege. The words of the English letters patent are not strictly those of a joint grant, for the invention may be exercised by the patentees, their executors, administrators, and assigns, "and every of them," and the use of these words, or the words "any of them," throughout the document cannot be disregarded. Apart from these special words, the nature of what is granted by the patent must be first considered. The patent is the reward of merit, and where it is conferred on two inventors it seems contrary to justice and common sense that on the death of one, perhaps before he has reaped any advantage from the patent, all the advantages to be derived from the patent and the invention should pass away from his estate to the survivor. It is not contested that where tangible property like a leasehold house is given to two or more, and their executors, administrators, and assigns, there is a joint tenancy, and the right of survivorship

COZENS-HARDY J.

1899

NATIONAL SOCIETY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS v. GIBBS.

attaches. Nor can it be denied that the benefits of a patent pass on bankruptcy to the trustee, or that they may be assigned. Nevertheless, the benefit under a patent is something very different from a house. The patentee has his invention and the right to use it before the letters patent are obtained. All that he gets by them is the right for a term of years to prohibit other people from using his invention without his licence. Of course the patentee, if only one, and his executors, administrators, and assigns are excepted from the prohibition, and if there are two or more patentees, their executors, administrators and assigns, or, according to the natural meaning of the words, the patentees and the executors, administrators, and assigns of each of them, are excluded from the prohibition. It is only by construing the words "their executors, administrators, and assigns" in a non-natural and technical sense that their use can be held to create joint tenancy or joint ownership, with the incident of survivorship, even in the case of tangible property, for "their" executors or administrators do not take anything—the only executors or administrators who take being, in the case of joint tenancy, those of the survivor of the original grantees. Where a mere right of prohibition is given the words should be construed in their natural sense, the executors and administrators of each grantee, like their testator or intestate, obtaining an independent privilege, an assignable exemption. The nature of the grant made by letters patent is considered in *Steers* v. *Rogers*. (1) The right of survivorship is a contractual or possessory incident—it cannot exist in the case of two independent exemptions, and, apart from the ancient rules as to tenure, there is no reason why it should exist in the case of patentees.

[COZENS-HARDY J. A patent can be assigned to other persons as tenants in common: *Smith* v. *London and North Western Ry. Co.* (2); *Walton* v. *Lavater*. (3) He also referred to *Mathers* v. *Green*. (4)]

The plaintiffs are entitled to joint and several covenants from the patentees, and, one being dead, his legal personal represen-

(1) [1893] A. C. 232.
(2) (1853) 2 E. & B. 69.
(3) (1860) 8 C. B. (N.S.) 162, 184.
(4) (1865) L. R. 1 Ch. 29.

tative succeeds to his liability. The nature of the transaction must be borne in mind on this point. The consideration for the sale was taken in severalty. It was contemplated, as the agreement shews, that the company might require the services of each individual vendor. Under clauses 2 and 4 "each" of the vendors may be called upon to do certain things, and clause 7 is drawn in terms wide enough to include joint and several covenants. The Court construes contracts as joint and several where it is the intention that both parties should be bound, and the plaintiffs are entitled to all covenants which are reasonable and necessary, and a several covenant is reasonable.

Eve, *Q.C.*, and *A. W. Rowden*, for the defendant Ruelle. The letters patent were granted to the patentees jointly in the form of words used in cases of a joint grant of personal property. There is no reason why a different effect should be given to the words because the subject-matter is a patent. "The right or privilege" granted "is an incorporeal chattel, which by the terms of the grant is impressed with all the character of personal estate by being limited to the grantee, his executors, administrators, and assigns": Morris's Patents Conveyancing, p. 2. The peculiar nature of the property has nothing to do with the question. The grant must be construed in the same way that any other Crown grant would be read.

On the second point, we rely on the words of the agreement, which are those of a joint covenant only. Even if there is no right of survivorship, words creating a tenancy in common would not justify the Court in construing a covenant expressly joint as a joint and several covenant: *White* v. *Tyndall* (1); *Sumner* v. *Powell* (2); *Wilmer* v. *Currey*. (3)

[COZENS-HARDY J. referred to *Other* v. *Iveson*. (4)]

It is where the interests of the covenantees are several that a covenant in form joint is sometimes read as several, and that doctrine is not to be extended to covenantors: Davidson's Conveyancing, 5th ed. vol. i. p. 92; 13 App. Cas. 277. A joint covenant has certain advantages. An intending covenantee,

(1) (1888) 13 App. Cas. 263, 274, 275.
(2) (1816) 2 Mer. 30.
(3) (1848) 2 De G. & Sm. 347.
(4) (1855) 3 Drew. 177.

COZENS-HARDY J.

1899

NATIONAL SOCIETY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS v. GIBBS.

"dissatisfied with the separate responsibility of the parties, may require that each covenantor shall not only be liable for his own, but also for the acts and defaults of his co-covenantor. Hence have arisen covenants joint; by which, each party becomes answerable for himself, and is in effect a surety also for the due performance of the covenant by the other": Platt on Covenants, p. 116. It is evident that the company did not by implication become entitled to several covenants. "In the rare cases in which" joint tenants "are beneficial owners, they are sometimes made to covenant jointly and sometimes severally. . . . It is better that they should covenant severally; but in order that the covenants of each of them may relate to the whole of the property and not merely to an undivided share of it, each of them should be expressed to convey the whole property as beneficial owner": Davidson's Conveyancing, 5th ed. vol. i. p. 96. "Joint tenants . . . . are sometimes made to covenant both jointly and severally": Dart's Vendors and Purchasers, 6th ed. p. 624.

[They also referred to *In re Gaulard and Gibbs' Patent* (1); *Richardson* v. *Horton* (2); Story on Contracts, s. 71, 5th ed. p. 61.]

Gore-Browne, in reply, referred to the Conveyancing Act (44 & 45 Vict. c. 41), s. 7; Davidson's Conveyancing, 4th ed. vol. ii. part 1, p. 359 (form of covenants on a sale of freeholds by beneficial joint tenants); Key and Elphinstone's Conveyancing Precedents, 5th ed. vol. i. p. 404; Bythewood and Jarman's Conveyancing, 4th ed. vol. iv. p. 805.

Cur. adv. vult.

April 28. COZENS-HARDY J. The plaintiffs in this action contracted, on May 25, 1883, to purchase certain letters patent for a large sum of money. The vendors were Gaulard, who died in 1888, and the defendant Gibbs. Gaulard's administratrix, Mme. Ruelle, is a defendant to the action. It is admitted that the plaintiffs have settled their disputes with the defendant Gibbs, and it is therefore not necessary for me to

(1) (1890) 7 Rep. Pat. Cas. 367. (2) (1843) 6 Beav. 185.

consider the action except as one between the plaintiffs, who are the purchasers, and the defendant Ruelle, who is the administratrix of Gaulard, one of the two vendors. The plaintiffs claim that the defendant may be ordered to assign and transfer to the plaintiffs the letters patent, and they also claim damages for breaches of the agreement and warranty contained in the contract of May 25, 1883. At an early stage it became apparent that there was a serious question whether the plaintiffs had any right against the defendant Ruelle. With the approval of the parties I thought it convenient to deal separately with this point, because if it is decided adversely to the plaintiffs it will not be necessary to consider other questions, including questions of foreign law, which may arise.

The short point for my decision is whether Gibbs, the surviving patentee, is not the only person having anything to assign and the only person liable to pay damages for breach of contract and warranty. The contract, so far as is material, is as follows. It is made between Gaulard and Gibbs, called the vendors, of the one part, and the plaintiff company of the other part. It recites that the vendors are the inventors of certain inventions, and that the vendors have obtained patents for the inventions in the countries mentioned in the schedule, and then it provides by clause 1 that the vendor shall sell and the company shall purchase the patents. Clause 2 provides that the vendors, and each of them, shall from time to time, at the request and cost of the company, do all such acts and things as by the company may be considered necessary or expedient for procuring any confirmation of the patents and privileges and keeping the patents on foot and for obtaining extensions and prolongations, and the vendors shall from time to time communicate to the company all such improvements and other inventions, and at the request and cost of the company apply for and obtain letters patent in respect of such improvements or other inventions. Then clause 3 provides that the company shall, in the event of any infringement of the letters patent, be at liberty to commence and carry on proceedings in their own name, or in the name of the patentees or any of them. By clause 4, the vendors and each of them are at all times, and without making any charge, to give all such advice, explanations,

COZENS-HARDY J.

1899

NATIONAL SOCIETY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS v. GIBBS.

and instructions to the directors and other officers of the said company as may be required. Clause 5 states the purchase-money, which is to be paid in shares and cash. Clause 6 provides that the vendors shall without delay, at the expense of the company and to the satisfaction of the solicitors of the company, establish a title to the patents and assign and transfer the same to them, and cause the same to be legally vested in the company, or such person or persons as the company shall appoint for the purpose. Clause 7—which is the clause under which damages are claimed—I had better read in full. [His Lordship read the clause, and continued:—]

It is admitted that all the patents were granted to Gaulard and Gibbs, and not to either of them separately, and it is not alleged that their rights inter se, whatever they may have been originally, have since been varied except so far, if at all, as they were varied by the contract.

The first question for my consideration is this: What was the nature of the interest of the patentees? I take the patent dated September 13, 1882, which is the only one to which my attention was called. It is in the form which I believe to be usual, if not universal, in the case of a grant to two patentees. It recited that Gaulard and Gibbs had presented their petition to the Crown, representing that they were in possession of an invention which the petitioners believed would be of great public utility; that they were the first and true inventors thereof, and that the same was not in use by other persons. And then it proceeds: "The petitioners therefore most humbly prayed that we would be graciously pleased to grant unto them, their executors, administrators and assigns, our Royal letters patent for the sole use, benefit, and advantage of the said invention within our United Kingdom." And later on it is as follows: "Know ye, therefore, that we of our special grace, certain knowledge, and mere motion, have given and granted, and by these presents for us and our heirs and successors, do give and grant unto the said Lucien Gaulard and John Dixon Gibbs, their executors, administrators, and assigns, our special licence, full power, sole privilege, and authority, that they, the said Lucien Gaulard and John Dixon Gibbs, their executors, administrators, and assigns, and every

of them by themselves, or by their deputy or deputies, servants or agents, or such others as the said Lucien Gaulard and John Dixon Gibbs, their executors, administrators, or assigns, shall at any time agree with, and no others, and from time to time and at all times hereafter, during the term of years expressed shall, and lawfully may, make, use, and exercise, and vend their said invention within our United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, in such manner as to them, the said Lucien Gaulard and John Dixon Gibbs, their executors, administrators, and assigns, or any of them shall in their discretion seem meet, and that the said Lucien Gaulard and John Dixon Gibbs, their executors, administrators, and assigns, shall, and lawfully may, have, and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for, and during the term of years herein mentioned, To have, hold, exercise, and enjoy the said licences, powers, privileges, and advantages hereinbefore granted or mentioned to be granted unto the said Lucien Gaulard and John Dixon Gibbs, their executors, administrators, and assigns." The rest of the patent I do not think I need read in detail.

On the construction of this grant I think the two patentees took a joint interest, which passed by survivorship to Gibbs on the death of Gaulard. It was scarcely disputed that a grant, whether by the Crown or by a private individual, of any ordinary species of property to A. B. and C. D., their executors, administrators, and assigns, would create a joint tenancy or joint interest, and not an interest in common. This is not a rule of tenure or of real property law. It applies to an assignment of a policy of assurance as much as to an assignment of a term of years. But it was urged that letters patent are of such a peculiar quality and nature that different principles of interpretation ought to be applied. I am unable to follow this argument. The right or privilege granted by the Crown by the letters patent is an exception from the general prohibition contained in the Statute of Monopolies. It is for all purposes to be regarded as property. It passes on bankruptcy as part of the assets of a bankrupt. On the death

COZENS-HARDY J.

1899

NATIONAL SOCIETY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS v. GIBBS.

of a patentee duty is payable on it as part of the assets of the deceased, and I can see no justification in principle, nor has any authority been produced for holding that a grant of letters patent to two persons, their executors, administrators, and assigns, creates anything more than a joint interest which will survive on the death of one of them, unless there has been a severance of the joint interest. An elaborate argument was addressed to me with a view of persuading me that survivorship between joint tenants is unreasonable, and cannot have been intended by the Crown. It is no doubt true that courts of equity have laid hold of slight circumstances to turn a joint tenancy into a tenancy in common, and there was at one time an idea that in equity all joint tenancies would be construed as tenancies in common. This, however, is clearly not so. I may refer to the judgment of Sir William Grant in *Aveling* v. *Knipe*. (1) It must not be forgotten that it is at any time open to two joint owners to sever their joint interest and to create a tenancy in common. A patent can be owned by tenants in common: see *Smith* v. *London and North Western Ry. Co.* (2) and *Steer* v. *Rogers*. (3) It follows therefore that, in my judgment, Gaulard's representative is not a proper party to the action in so far as it seeks an order for the assignment of the patents, inasmuch as the whole interest in the patents is vested in Gibbs as the survivor of the two joint patentees.

The second, and, in my view, a more difficult question, has now to be considered. Assuming that Gibbs and Gaulard were jointly interested in the patent, what is the nature of the obligation created by clause 7? Is it merely a joint covenant, in which case the only person who could be sued upon it would be Gibbs, as the survivor; or is it a several covenant, or a joint and several covenant, under which either Gibbs or Gaulard, or the representatives of either of them, could be sued? This must depend upon a careful consideration of the language of the instrument. In the first place, the agreement itself is under seal, so that the obligations imposed are really covenants. In the second place, the obligation in question is something to be contained in the assignment of the patents, and when it is once held that Gaulard's representative is not

(1) (1815) 19 Ves. 441. (2) 2 E. & B. 69. (3) [1893] A. C. 232.

a necessary party to the assignment, it will be somewhat remarkable if the purchaser can require the concurrence of the representative, not for the purpose of assigning, but solely for the purpose of entering into a covenant binding herself, not in her individual character, but solely in her representative character and to the extent of Gaulard's assets. I doubt whether such a deed of assignment was ever seen. Certainly I never saw such a deed. It may be that the proper form of covenants for title in an assignment by two joint tenants is to make them not joint, but joint and several. But it does not follow that after the death of one of the joint tenants before assignment his representative can be required to join for the mere purpose of covenanting. In the third place, the obligation in question is not one which the law implies from the contract of sale. It is a special and peculiar stipulation for which the plaintiffs have bargained, and which they have obtained from the vendors. In this point of view it is difficult to see what justification there can be for enlarging or altering the words used. Those words provide that the deed shall contain a covenant by the vendors. Now such a covenant, in the absence of any qualifying context, must be a joint covenant. The case of *White* v. *Tyndall* (1) is a direct authority on this point. The form of the covenant is joint, and I do not feel justified in making it several.

For those reasons I have arrived at the conclusion that the plaintiffs are not entitled to any relief against Gaulard's representative. It follows that the action must be dismissed with costs, and that the counter-claim must likewise be dismissed with costs, there being the usual set-off. If it should be held that I have erred in the view I have taken upon the points which alone have been argued, it will be necessary that the action should be sent back, in order that the other matters raised by the pleadings may be adjudicated upon.

Solicitors for plaintiffs: *Campbell, Reeves & Hooper.*
Solicitor for defendant Ruelle: *Edward Betteley.*

(1) 13 App. Cas. 263.

F. E.

COZENS-HARDY J.

1899

May 11, 12.

ALEXANDER *v.* AUTOMATIC TELEPHONE COMPANY.

[1898 A. 1411.]

Company—Shareholder—Subscribers to Memorandum of Association—Special Agreement as to Calls—Action on behalf of all Shareholders—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 23—*Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 24, *sub-s.* 1.

Although the subscribers to a company's memorandum of association become on its incorporation members of the company in respect of the shares set opposite their names in the memorandum, they are not, in the absence of a special agreement, liable to pay anything on the shares except in respect of calls made in the manner provided by the articles. And where the articles provide that the directors may make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid and in the time of payment of such calls, the directors may agree with subscribers of the memorandum who are also directors that nothing shall on allotment be paid on the shares set opposite their names in the memorandum, although payments on allotment are required from other shareholders.

THE Automatic Telephone Company, Limited, was incorporated on June 30, 1897, with a capital of 100,000*l.* in shares of 5*s.* each. The eight signatories to its memorandum of association were Margowski for 19,400 shares, the same person as managing director of the Honduras Government Banking and Trading Company, Limited, for 6000 shares, M. J. Alexander for ten shares, J. D. Gibbs for ten shares, Baron Cohen for ten shares, Justin Mendelson for ten shares, J. W. Cohen for 200 shares, and H. G. Sworn for 800 shares. Clause 5 of the articles of association provided that the shares of the company should be "under the control of the directors, who may, subject to the terms of the company's memorandum of association, issue, allot, or otherwise dispose of the same to such persons, for such consideration, and upon such terms and conditions as the board may determine . . . . and may make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid and in the time of

payment of such calls": see s. 24 of the Companies Act, 1867. Art. 13 provided that the directors might "(subject to any special terms made on allotment) from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit, provided that one month's notice at least is given of the time and place for payment, and that no one call shall exceed 20 per cent. of the nominal amount of the shares, and that such calls shall be made at intervals of not less than one month." On June 30, 1897, before the company was incorporated, it was agreed at a meeting of the signatories of the memorandum of association that nothing should be payable by Margowski, J. W. Cohen, Sworn, or the Honduras Company on application or allotment in respect of their memorandum shares, and that the memorandum was signed on this condition. At a board meeting after incorporation—namely, on July 5, 1897—at which all the directors of the company, namely, Margowski, J. W. Cohen, Sworn, Alexander, and Gibbs, were present, two resolutions were passed (Alexander and Gibbs being present and voting in their favour) for the allotment of shares; by the first resolution the memorandum shares were allotted without requiring any payment on allotment, and by the second resolution a payment of 2*s.* 6*d.* per share in respect of other shares was required on allotment (6*d.* per share having been required to be paid on application for these shares). The memorandum shares and a number of other shares were allotted, and on all of them, except those held by Margowski, J. W. Cohen, Sworn, and the Honduras Company, the sum of 3*s.* had been paid.

The present action was brought by M. J. Alexander and J. D. Gibbs, "suing on behalf of themselves and all other shareholders," in the defendant company, against the company and three of its directors—namely, Margowski, J. Woolf Cohen, and Sworn. In respect of the shares held by Margowski, J. W. Cohen, Sworn, and the Honduras Company, the plaintiffs alleged that only 784*l.* in all had been paid, and that on these shares there was still due and payable the sum of 3176*l.*, and the plaintiffs complained that the three defendant directors, being a majority of the board, were able to, and did, control its

COZENS-HARDY J.

1899

ALEXANDER v. AUTOMATIC TELEPHONE COMPANY.

action by their votes, and, in breach of their duty as directors and against the interests of the defendant company, prevented the passing of resolutions or taking steps to enforce payment by such defendants or the Honduras Company (in which they were said to be interested) of the amounts due on their shares and the shares held by the Honduras Company. This, however, the plaintiffs complained, did not prevent the defendant directors by means of their voting power making a further call of 1*s.* per share, and the plaintiffs' case was that the defendant directors were acting in furtherance of their own interests and in fraud of the rights of the other shareholders, and were using the powers entrusted to them as directors for their own ends, and not for the benefit of the company. It was also alleged that the defendant directors had control of the majority of the votes of the shareholders of the defendant company. The plaintiffs accordingly asked for a declaration that the holders of the memorandum shares were bound to pay up 3*s.* per share—namely, 6*d.* on application and 2*s.* 6*d.* on allotment, like the holders of other shares. The defendants pleaded the agreement made before incorporation, the resolutions passed by the directors immediately after incorporation, and that they had been guilty of no dereliction of duty.

Eve, Q.C., *Rawlinson, Q.C.*, and *Harry Dobb*, for the plaintiffs. Contrary to the usual practice, most of the signatories to the memorandum of association signed it for a large number of shares, and the object of the action is to make such of them as have not paid for their shares, or have not paid so much on them as other members of the company have paid on their shares, "level up." The case seems to be covered by *Hovenden* v. *Wallace*. (1)

The defendants will no doubt rely mainly on clause 5 of the articles of association, which enables the directors to "make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid and in the time of payment of such calls," and the insertion of such a provision is no doubt justified by s. 24, sub-s. 1, of

(1) *The Times*, April 27, 1899.

the Companies Act, 1867. Reliance may also be placed on art. 13, which refers to special terms as to calls being made on allotment.

But art. 5 does not justify the directors in using their powers entirely to benefit themselves. They have no right to resolve, being in the majority, that every member's shares shall be paid up except their own. They are, as directors, in a fiduciary position, and cannot be allowed to use their powers simply and solely with a view to their own personal benefit.

An action in this form seems to be justified by *Atwool* v. *Merryweather*. (1) If an action is commenced against directors in the name of the company there is generally a loss of time occasioned by a motion to strike out the company's name as being used without authority, and an action on behalf, &c., is always permitted when it is the only means of obtaining justice. When the powers of the directors are being abused it is not necessary to join the company as plaintiff.

The directors say that at the meeting of the signatories on June 30, 1897, it was agreed that nothing should be paid on application or allotment on the memorandum shares; but that agreement was before the incorporation of, and does not bind, the company. Immediately afterwards the memorandum of association was signed, and thereby the signatories, in respect of the shares for which they signed it, became immediately on incorporation members of the company under ss. 18 and 23 of the Companies Act, 1862. Then the defendant directors say that under the resolutions of July 5, 1897, after incorporation, the memorandum shares held by them and the Honduras Company were validly allotted on the terms of which the plaintiffs complain. But the signatories had already become members, and no allotment or registration under s. 23 was a condition precedent to their becoming members. (2) The provisions of the articles, therefore, do not apply so to alter their liability to pay up their memorandum shares in full. The mere fact of signing makes them liable, on incorporation, to pay for the shares.

(1) (1867) L. R. 5 Eq. 464, n.

(2) See *Tufnell and Ponsonby's Case*, (1885) 29 Ch. D. 421, 445.—F. E.

COZENS-HARDY J.

1899

ALEXANDER v. AUTOMATIC TELEPHONE COMPANY.

[COZENS-HARDY J. Only when and as calls are made in respect of the shares, or as specially agreed upon.]

Rufus Isaacs, Q.C., *P. F. Stokes*, and the *Hon. Frank Russell*, for the company and Margowski, called certain witnesses for the defendants; but neither they, nor *H. P. Chapman*, for the defendant Cohen, nor *Astbury, Q.C.*, and *W. F. Hamilton*, for the defendant Sworn, were called upon as to the legal points.

COZENS-HARDY J. In my judgment, this action is misconceived. I assume in favour of the plaintiffs—but without in the least deciding, or even expressing an opinion in their favour—that the plaintiffs are competent to sue on behalf of themselves and all other the shareholders of the defendant company. What they ask is, as Mr. Eve very clearly put it, a declaration that all the shares allotted to the signatories of the memorandum of association were held upon the same terms and subject to the same conditions as the shares taken by the public, or, in other words, subject to the obligation to pay a deposit of 6*d.* per share on application, and a further sum of 2*s.* 6*d.* on allotment—that is to say, that the signatories were subject to that condition. Now I have endeavoured to see on what possible ground such a theory can be based. It seems to be based upon the ground that there is an immediate debt due from every member of the company in respect of uncalled capital. That appears to me to be an entire fallacy. In the words of the Master of the Rolls in *In re Russian Spratts Patent* (1), uncalled capital is not a debt—it is a right to make a call and create a debt. It is not correct to say that the signatories to the memorandum of association, by virtue of which they agreed to become and became members of the company, became at once debtors to the company to the full amount of their shares. Their position in this case is this, and this only—that they are subject to art. 13. What is the effect of art. 13? A member is to be liable, apart from any special terms, to pay such calls as the directors may from time to time make upon him; but he is not to be liable and cannot be compelled to pay

(1) [1898] 2 Ch. 149.

otherwise than in that way. There is a further limitation that he cannot be required to pay any call exceeding 20 per cent. of the nominal amount of the shares, nor can he be required to pay a call except at intervals of one month. It is quite true that there is a power to make special terms on allotment, but the argument on the part of the plaintiffs seems to have proceeded on the assumption that it is necessary for the signatories to prove that some special terms are made in their favour. On the contrary, as I read art. 13, it is for those who allege any obligation to pay otherwise than on account of the calls made at due intervals and with due notice to prove some other special terms or bargain. Now we have the special terms and bargain made with other members with reference to the 6*d.* and 2*s.* 6*d.* The applications for the shares in respect of which those amounts were to be paid were made and were accepted expressly upon those terms—that 6*d.* should be paid on application and 2*s.* 6*d.* on allotment. That was in strict accordance with art. 13. But where is any such arrangement made with respect to the shares of the signatories? I can find nothing, and I find evidence of what is clearly inconsistent with any such arrangement. I do not attach weight to what took place on June 30, 1897, which obviously does not bind the company; but it furnishes a motive for, and an explanation of, what undoubtedly did take place on July 5 after incorporation. At the meeting which took place on that day the allotments were made. Not only were separate resolutions for allotments then passed, but applications for allotments were then considered, and it is perfectly clear that in respect of these signatories, with whom alone I have to deal, the allotments were made on the terms that nothing should be payable on application or allotment. This is really an attempt, when allotments have been made and accepted on those terms, to alter the entire contract entered into between the signatories and the company, and, strangest of all, it is an attempt made by two gentlemen who themselves approved of and took part in passing the resolutions, and who now ask me to say that these shares could only have been properly allotted upon the terms of the signatories paying 6*d.* on application and 2*s.* 6*d.* on allotment. I can find no

COZENS-HARDY J.

1899

ALEXANDER v. AUTOMATIC TELEPHONE COMPANY.

foundation in fact and nothing in law to justify me in arriving at such a conclusion. A member of a company is not liable to pay anything except in respect of calls made in the manner provided by the articles. This is an attempt to make members of the company pay for shares otherwise than in accordance with the articles. In my judgment the attempt wholly fails, and I dismiss the action with costs.

Solicitors for plaintiffs: *White & De Buriatte.*
Solicitors for defendant Sworn: *Haynes & Claremont.*
Solicitors for other defendants: *Spyer & Sons.*

F. E.

COWEN *v.* TRUEFITT, LIMITED.

C. A. 1899 June 28.

[1897 C. 2162.]

Lease — Construction — Parcels — Right of Way — Misdescription — Falsa Demonstratio — Common Mistake — Rectification.

Where in a grant or devise the description of parcels is made up of more than one part, and one part is true and the other false, there, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected as falsa demonstratio, and will not vitiate the grant or devise. The doctrine is not to be confined to cases where the first part of the description is true and the latter untrue, it being immaterial in what part of the description the falsa demonstratio occurs.

Rooms on the second floor of Nos. 13 and 14, Old Bond Street, were demised, together with free ingress and egress for the lessee "through the staircase and passages of No. 13" to and from the demised premises: there was no staircase in No. 13 leading to the demised premises, but there was a staircase in No. 14:—

Held, upon the evidence, that there had been a common mistake, the intention of the parties being that the lessee should have the use of the staircase of No. 14, and that accordingly the doctrine of falsa demonstratio did not apply; but the Court ordered the lease to be rectified by the substitution of the staircase of "No. 14" for that of "No. 13," thus in effect affirming the order of Romer J., [1898] 2 Ch. 551.

APPEAL by the defendants from the decision of Romer J. (1)

By the judgment pronounced by his Lordship it was declared that during the existence of the underlease the plaintiff was entitled to a right of free ingress and egress for herself, her servants and customers through "the staircase" of No. 14, Old Bond Street, to and from the premises demised on the second floor of the messuages Nos. 13 and 14, Old Bond Street, and the same was ordered accordingly; and it was also ordered that the defendants be restrained during the existence of the underlease from interfering with such right. The defendants' counter-claim was then dismissed with costs.

At the hearing of the appeal it appeared that the mistake in the underlease occurred through the description having been taken from a plan of the premises indicating that the staircase in No. 13 was existing: also that there were two staircases in

(1) [1898] 2 Ch. 551.

C. A. 1899 COWEN v. TRUEFITT, LIMITED.

No. 14, a back and a front. The evidence as to what took place during the negotiations between the parties prior to the granting of the underlease to the plaintiff was, as stated in the report in the Court below, very conflicting; but the Court of Appeal came to the conclusion that the intention of the parties was that the plaintiff should have the use of the lift, and also the use of the back staircase in No. 14.

Levett, Q.C., and *J. R. Brooke*, for the defendants. We submit that the learned judge below has misapplied the doctrine of "Falsa demonstratio non nocet." In order to apply the doctrine you must have something clear and certain at the beginning of the description, followed by an incorrect description. *Wrotesley* v. *Adams* (1), which was referred to by the learned judge, rather helps our contention, for it is said, in continuation of the passage he read in his judgment, "And so the words of the certainty, viz., which I have by descent on the part of my father, being added to the general words which were incertain, are of effect." If, then, there is a clear description, followed by something that is inconsistent with it, the inconsistent part can be rejected as falsa demonstratio; it is the later words that make the falsa demonstratio: Shep. Touchs. p. 247; *Doe* v. *Galloway*. (2)

[SIR F. H. JEUNE referred to *Chamberlaine* v. *Turner* (3), where the devise was of "the house or tenement wherein William Nicholls dwelleth, called the White Swan." William Nicholls was in possession of three rooms only in the White Swan, but it was held that the whole house passed, and not merely the three rooms in William Nicholls' possession.]

That case was dealt with by Lord Hardwicke in *Gascoigne* v. *Barker* (4), where he considered there was no difficulty in it, for, he said, the previous part of the description being true, it was of no consequence if there were twenty other lodgers, for William Nicholls dwelt there likewise. Here you cannot strike out "No. 13," as the learned judge did, and put in "No. 14."

The plaintiff appeared in person, and insisted that she was

(1) (1558) Plowd. 187, 191.
(2) (1833) 5 B. & Ad. 43, 51.
(3) (1628) Cro. Car. 129.
(4) (1743) 3 Atk. 8.

entitled to the use of a staircase for the proper enjoyment of the premises demised to her, and the carrying on of her business there; and that she ought not to be confined to the use of the lift, for which there was an attendant at certain hours only.

LINDLEY M.R. [After stating the facts, and referring to the evidence of the parties as to what was arranged between them prior to the granting of the underlease with regard to the user by the plaintiff of the back staircase in No. 14, Old Bond Street.] The real agreement, I have no doubt, was that the plaintiff was to have the use of the lift, and also of the back staircase in No. 14. It was not thought at the time that the use of this staircase would be a matter of importance; but now that the plaintiff's business has developed and become larger, her use of the staircase is complained of as a nuisance, and it is contended that she is not entitled to it by the terms of the underlease. [His Lordship then read the grant in the underlease of the use of the "staircase," which was in fact non-existent, in No. 13, and referred to the plan which he said had caused the blunder in the underlease, and continued:—]

There being this blunder, what is to be done? It is said that, by a particular mode of construction, we should come to the conclusion that, as the right of passage through No. 13 was inapplicable to the building as it actually existed, it must follow, according to the doctrine of falsa demonstratio, that the right must be applied to the staircase of No. 14. I do not know that the doctrine is applicable where the Court can see, as it can see in this case, what it is that the parties really did mean by the particular document in question.

I must, however, protest against the way in which the doctrine was stated by the appellants' counsel—that the maxim "Falsa demonstratio non nocet" only applies when there is some incorrect description at the end of the sentence. That is whittling away the doctrine and making it ridiculous: it is a misapprehension. I do not know that the principle can be better put than it is in Jarman on Wills, 5th ed. p. 742, where it is said the rule means "that where the description is made up of more than one part, and one part is true, but the other

C. A. 1899 COWEN v. TRUEFITT, LIMITED. Lindley M.R.

false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. 'The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only.' Thus, in *Day* v. *Trig* (1), where one devised 'all his freehold houses in Aldersgate Street, London,' having in fact only leasehold houses there, it was held that the word 'freehold' should rather be rejected than the will be wholly void, and that the leasehold houses should pass."

To limit that doctrine in the way that counsel suggested is to deprive it of half its merit. The rule is a rule of good sense. If the language is clear, but does not fit because of some words which have been inserted, then, if it is possible to reject the part that makes it inapplicable, the Court will do so. On the construction of the underlease, I should feel some difficulty in coming to the conclusion that the plaintiff was entitled to the use of this staircase; but on the question of rectification I see no difficulty whatever. On the evidence I think the learned judge was quite right: when once it is ascertained that it was intended that the plaintiff should have access to her rooms by a staircase, and it was found that there is only one staircase by which such access can be had, it follows that it was right to make an order giving her the use of that staircase. The order should, however, be amended by adding the word "back" before "staircase," as every one agrees that it was the back staircase that she was to use. With that addition to the order the appeal will be dismissed with costs.

SIR F. H. JEUNE. I agree with the judgment that has been delivered. For some time I thought that the doctrine of falsa demonstratio might be applied here. The learned judge proposed to apply it by striking out the words "No. 13" as being a mere falsa demonstratio, but I do not think that the principle applies. I doubt whether the words "staircase and passages" are a sufficiently clear description of a back staircase, for there are two staircases in No. 14, a back and a front. I think, if

(1) (1715) 1 P. Wms. 286.

the principle is to be applied at all, the words "No. 13" would have to be struck out all through; but when one considers that, as the Master of the Rolls has pointed out, the real mistake was in supposing that there was a staircase in No. 13, it is not, in my opinion, really a case of falsa demonstratio at all, but the clear words of the lease apply to something which is non-existent, so that the principle cannot be invoked in aid of the construction of the lease.

I agree, however, that the doctrine is not to be cut down, as was suggested by the appellants' counsel, by saying that it is to be limited to cases where the false part of the description follows the true. That would be cutting down what is a rational and useful canon of construction. Leaving that aside, there is no difficulty in rectifying the underlease. To my mind it is clear that it was owing to a mistake of all parties that these words were inserted. It was intended that the plaintiff should have the use of the back-stairs without any limit. The extent of her use was left to the good sense and proper feeling of the plaintiff. No doubt the defendants thought it would not be much used, and in conversation something to that effect was said; but the real intention was that there should be egress and ingress by these stairs to No. 13.

Under these circumstances there is no difficulty in rectifying the underlease as the Master of the Rolls suggested, so as to shew that the ingress and egress is to be by the back-stairs.

RIGBY L.J. I entirely agree. As to falsa demonstratio, one can see plainly what the underlease means on its construction. It means that the plaintiff is to have the use of a staircase communicating with the second floor of Nos. 13 and 14. [His Lordship referred to the mistake in the plan and commented on the fact that none of the persons who knew the premises, and who must have known that no staircase existed in No. 13, corrected the plan. He observed that the mistake was on both sides, and continued:—]

I will only add on this part of the case that I altogether reject the argument, as my learned brothers have done, that in applying the doctrine of falsa demonstratio it is material in

C. A. 1899 COWEN v. TRUEFITT, LIMITED.

what part of the sentence the falsa demonstratio is found. To adopt such an argument would be to reduce a very useful rule to a mere technicality.

[His Lordship then referred to the evidence on the question of rectification, and agreed to the order being made in the form indicated by the Master of the Rolls.]

Solicitor for appellants: *W. H. Herbert.*
Solicitor for plaintiff: *W. H. Perkin.*

G. I. F. C.

C. A. 1899 *July* 4.

In re MOSS. KINGSBURY *v.* WALTER.

[1898 M. 1927.]

Will—Class Gift—Gift to "A. and the Children of B."—Death of A. in Testator's Lifetime—Lapse—Survivorship—Period of Distribution.

A testator gave property in trust for his wife (who survived him) for life, and after her death for his niece A. and the children of his sister B. who should attain twenty-one equally. At the date of the will there were living A. and five children of B., but A. died in the testator's lifetime. At the death of the tenant for life B.'s five children were still living and had all attained twenty-one:—

Held (reversing North J.), that the gift was a gift to a class, and that consequently A.'s death in the testator's lifetime had not caused a lapse of her share, but the whole gift passed to the five children as the members of the class surviving at the period of distribution.

Per Romer L.J.: A gift by will to a class, properly so called, and A. equally, so that the testator contemplates A. taking the same share that each member of the class will take, is primâ facie a gift to a class.

WALTER MOSS by his will dated in 1876, after appointing his wife Elizabeth Moss and his niece Elizabeth Jane Fowler his executrixes, and making sundry devises and bequests, gave all his share or interest in the *Daily Telegraph* newspaper unto the said E. Moss and E. J. Fowler "upon trust to pay the income thereof to my said wife for her life, and after her decease, upon trust for the said E. J. Fowler and the child or children of my sister Emily Walter who shall attain the age of twenty-one years equally to be divided between them as tenants

in common." And he gave the residue of his estate and effects to his wife. And he empowered his trustees with the consent of his wife during her life and afterwards at their discretion to sell all or any part of his said share or interest in the *Daily Telegraph* newspaper, and directed them to invest the net proceeds as therein mentioned, and to stand possessed of the investments upon the like trusts as were thereinbefore declared concerning the said share or interest in the *Daily Telegraph* newspaper in favour of his said wife and the said E. J. Fowler and the child or children of his said sister Emily Walter.

The testator died in 1893, and his will was proved by his widow, Elizabeth Moss, alone. At the date of his will there were living his niece Elizabeth Jane Fowler, who was then slightly under twenty-one, his sister Emily Walter, and five children of Emily Walter.

Elizabeth Jane Fowler died in 1891, in the testator's lifetime, a spinster. Emily Walter and her five children survived the testator.

The testator's widow, Elizabeth Moss, the tenant for life of his *Daily Telegraph* share and his residuary legatee, died in 1897, having by her will given her residuary estate, including any share or portion of a share in the *Daily Telegraph* newspaper which might belong to her at her death, to her trustees in trust for sale and to stand possessed of the proceeds, after payment of her funeral and testamentary expenses, debts, and legacies, in trust for William George Kingsbury absolutely; and she appointed him and another her trustees and executors.

At her death all the five children of Emily Walter were living and had attained twenty-one.

The question was whether, in consequence of the death of Elizabeth Jane Fowler in the lifetime of her uncle, the testator, the share bequeathed to her in his *Daily Telegraph* share had lapsed and fallen into his residuary estate, or whether the entirety passed to Emily Walter's five children: in other words, whether the gift by the testator of his *Daily Telegraph* share was a gift to a class, so that these five children, as the survivors of the class, took the whole.

To have this question decided, an originating summons was

C. A. 1899 — Moss, *In re.* — Kingsbury v. Walter.

taken out by W. G. Kingsbury and his co-trustee and co-executor of the testator's widow, Elizabeth Moss, W. G. Kingsbury being also her residuary legatee, against Emily Walter's five children and also against Emily Walter as the present trustee of the *Daily Telegraph* share, to have it declared that the bequest of the testator's share in the *Daily Telegraph* newspaper upon trust, after the death of his wife, for Elizabeth Jane Fowler and the child or children of Emily Walter who should attain twenty-one equally, was not a gift to a class, but that the share bequeathed to Elizabeth Jane Fowler had lapsed by her death in the testator's lifetime and thus fell into the residue of the estate.

The summons was heard on December 14, 1898, by North J., who, after saying the cases upon the point were so irreconcilable that he should act independently of them, held that, as he could find nothing in the will to shew that Elizabeth Jane Fowler was included in the class, the share given to her lapsed by reason of her death in the testator's lifetime, and so passed to the plaintiffs.

The defendants, the five children of Emily Walter, appealed.

The appeal was heard on July 4, 1899.

Swinfen Eady, Q.C., *H. Terrell, Q.C.*, and *Fawcus*, for the appellants, contended that there was a class gift precisely within the definition given in Jarman on Wills, 5th ed. vol. i. p. 232; 4th ed. vol. i. p. 268, and relied on *In re Jackson* (1), following *Re Stanhope's Trusts* (2), *Aspinall* v. *Duckworth* (3), *Pearks* v. *Moseley* (4), *Clark* v. *Phillips* (5), and *Knapping* v. *Tomlinson*. (6)

Haldane, Q.C., *Vernon Smith, Q.C.*, and *Ball*, for the plaintiffs, contended that the gift was not to a class, and that therefore the share of Elizabeth Jane Fowler had lapsed by reason of her death in the testator's lifetime.

[They referred to *In re Spiller* (7), and relied on *In re*

(1) (1883) 25 Ch. D. 162.
(2) (1859) 27 Beav. 201, 203–4.
(3) (1866) 35 Beav. 307, 309.
(4) (1880) 5 App. Cas. 714, 723.
(5) (1853) 17 Jur. 886.
(6) (1864) 34 L. J. (Ch.) 3, 7.
(7) (1881) 18 Ch. D. 614.

Chaplin's Trusts (1), followed in *In re Allen* (2), and *Drakeford* v. *Drakeford.* (3)]

Hatfield Green, for the defendant, Emily Walter.

Lindley M.R. It is very difficult to construe this will by the light of the authorities. I entirely agree with North J. that the authorities do not help one much, because they are in inextricable confusion. I do not think there is any case which can be cited by either side which cannot be matched by a case on the other side more or less difficult to distinguish from it. The practical question which we have to decide on this will is, Who are the persons now entitled to the share of the testator in the *Daily Telegraph* newspaper? There are several rival views. One view is, and that is the one adopted by the learned judge below, that the share which Elizabeth Jane Fowler would have taken if she were alive—that is, one-sixth, as I understand it—has lapsed and has fallen into the residuary estate, so that, according to that view, one-sixth of that share has gone to persons who were certainly never intended to take it. That is obvious. That may be the legal result of the gift, but it is obvious it was never dreamt of by the testator. What he intended was that his share should go amongst the persons he has named and to no one else.

Now the difficulty lies in this. We hear about classes, and gifts to classes, and definitions of classes. You may define a class in a thousand ways: anybody may make any number of things or persons a class by setting out an attribute more or less common to them all and making that the definition of the class. We have been referred, and not improperly at all, to Mr. Jarman's definition of a class for the purpose for which lawyers want it—that is, in construing a will—and I think Mr. Swinfen Eady is right in saying that, looking at that definition, this case does come within it. But after all, whether you call this a class or whether you call it a number of persons who are treated by the testator as if they were the class, appears to me

(1) (1863) 33 L. J. (Ch.) 183. (2) W. N. (1881) 6; (1881) 29 W. R. 480.
(3) (1863) 33 Beav. 43.

C. A. 1899 — Moss, *In re.* — Kingsbury *v.* Walter. — Lindley M.R.

to be merely a matter of language. One is very reluctant to frame definitions unless one can make a law to accord with the definitions, which judges cannot do. Now what is to be done with the share of this lady who has died? The testator says it is to be equally divided between her and the children of Emily Walter, to be equally divided between them all. If some of them are dead, are the shares of those who are dead to go to those who survive, or are they to go to someone else? That is the practical question; and whether you call the persons a class or "in effect" a class—as Mr. Theobald does in a passage of his work on wills, where he says (4th ed. p. 645), "it is clear that a gift to A., and the children of B., may in effect be a gift to a class, if the testator treats the legatees as a class"—or whether you call them a number of persons who are to be treated as a class, is quite immaterial. The guiding question here is, What is to be done with this *Daily Telegraph* share which is to be divided amongst these legatees? It seems to me that it is to go to such of them as shall be living. That is the obvious intention. The alternative view takes the share away where it was never intended to go, and upon that ground it appears to me that we ought to differ from the learned judge. I confess, and I say so frankly, that if this case had come before me in the first instance I should have decided it as North J. did, but my brother Romer has convinced me that is not right.

Sir F. H. Jeune. I agree. I do not propose to add anything that may tend to make the decisions which are already contradictory and complicated still more so.

Romer L.J. In the absence of any context negativing this view, I think that, when a testator gives property X. to A. and a class of persons—say the children of B.—in equal shares, he intends that the whole of X. shall pass by his gift if any one of the children of B. survive him, even although A. does not. Clearly, if A. survived and none of the children of B. survived so as to share, then A. would take the whole, for A. would

either have to take the whole or nothing, unless indeed it could be said that you are to look at the number of children of B. living at the date of the will and say there is an intestacy as to the share of each child dying between the date of the will and the testator's death; but that to my mind is clearly an untenable proposition. If then the testator intended that A. should take the whole if none of the children of B. survived him to share, I think also he intended the children of B. to take the whole if A. did not survive so as to share. There is no satisfactory distinction, to my mind, between those two cases. I think that, in such a gift as I have mentioned, what the testator really means is that the property is to be shared equally by a body constituted of such of the following as should be existing at the date of the testator's death, that is to say, A. and the children of B. And generally, when the testator—there being nothing to negative the view in the rest of the will—gives property to be shared at a particular period equally between a class properly so called and an individual or individuals, I think that what the testator primâ facie must be taken to mean is that you are to see which part of that aggregated body is to share in that property at the time it comes for distribution, and that such a gift is really a gift to a class: and though I am perfectly well aware of the danger there is in attempting to lay down general propositions—and few judges would more shrink from doing so than I, knowing as I do how a general proposition laid down often hampers judges in dealing with succeeding cases—yet I do think in the present case I may venture to make the following statement, especially as the cases are so complicated and there is no express decision of the Court of Appeal or of the House of Lords upon the point. In my opinion it is correct to say that a gift by will to a class properly so called and a named individual such as A. equally, so that the testator contemplates A. taking the same share that each member of the class will take, is primâ facie a gift to a class.

For those reasons, applying those principles to the case before us, I have no hesitation in saying that, in my opinion, the gift here was a gift to a class, and that Elizabeth Jane

C. A. 1899 Moss, *In re.* Kingsbury *v.* Walter.

Fowler was only intended to share as one of a class; and that inasmuch as she did not survive so as to share, the rest of the class takes the whole of the property.

Solicitors: *V. I. Chamberlain; Tilleards.*

G. I. F. C.

C. A. 1899 *June* 29, 30; *July* 14.

DAY *v.* SINGLETON.

[1897 D. 2298.]

Vendor and Purchaser—Contract for Sale—Leaseholds—Assignment—Lessor's Consent—Duty of Vendor—Default of Vendor in obtaining Consent—Loss of Bargain—Liability of Vendor—Damages.

A purchaser of leasehold property, which the vendor cannot assign without a licence from his lessor, is entitled to damages (beyond return of the deposit, with interest and expenses) for loss of his bargain by reason of the vendor's omission to do his best to procure such licence.

A vendor agreed with a purchaser for the sale of a leasehold hotel, subject to the consent of the lessor being obtained to the assignment of the lease, and the purchaser paid a deposit on his purchase-money. The vendor died without having completed his contract, and the purchaser then brought an action against his legal personal representative for specific performance. The defendant, being desirous of freeing the vendor's estate from the action, induced the lessor to refuse his consent to the assignment, which the lessor accordingly did, and the purchaser thus lost his bargain. Thereupon the purchaser amended his action by claiming damages and return of the deposit:—

Held, that the plaintiff was entitled, not only to the return of his deposit, with interest and costs of investigating title, but also to the damages he had sustained by the loss of his bargain through the omission of the defendant to obtain the lessor's consent.

Bain v. *Fothergill* (1874) L. R. 7 H. L. 158, considered.

Decision of Romer J. reversed.

Appeal from Romer J.

In 1897 Alexander Douglas Dunn was the lessee, under a lease of April 1, 1884, for an unexpired term of about sixteen years, of a private hotel called "Cocker's Hotel," in Charterhouse Square, London. His lessors were the governors of the Charterhouse, and a Mr. Lee was their solicitor and agent. The lease contained several restrictive covenants restricting the lessee from (amongst other things) making structural

alterations and from assigning the premises without the written consent of the lessors.

In or about March, 1897, Dunn proposed to the lessors that they should grant him a new lease as he wished to make certain alterations, including the erection of a public bar. The lessors were willing to grant him a new lease until 1940 and to allow the alterations to be made, including the erection of a bar, so that, so long as he himself was their tenant, liquors might be supplied to persons staying in the hotel or using the restaurant for luncheon or dinner; but the lessors insisted upon reserving power to remove the bar at any time should they think fit so to do.

The alterations and the erection of the bar were begun by Dunn, and while proceeding with them, he entered into an agreement with the plaintiff, Francis Day, for the sale to him of the hotel and business. The agreement was constituted by a memorandum of April 1, 1897, which acknowledged the receipt from the plaintiff of 325*l.* as a deposit on the purchase-money. It stated, "the lease has about forty years to run"; also the amount of rent and takings; and Dunn undertook to finish his contract he then had with his builders for completion of the alterations and the additions; and it concluded, "The title of the above premises to be satisfactory and subject to landlords' consent to transference of lease: price 6500*l.* all at."

The day after this agreement was signed—namely, on April 2, 1897—Mr. Lee, the lessors' agent, was informed of it by Dunn's solicitors, Messrs. Roscoe & Hincks, and they suggested that the new lease should be granted direct to the plaintiff, Day, whom they stated to be a man of respectability and good means. No objection was made by the lessors' agent to the proposed transfer by Dunn to Day, but no promise was made to accept Day, and Dunn was plainly told that the retention of the bar by Day would not be allowed.

On April 26, 1897, Dunn died. Litigation then ensued in the Probate Division respecting his will. On May 24, 1897, the defendant Singleton was appointed his administrator pendente lite, and on April 13, 1898, the other two defendants duly proved the will as executors.

C. A. 1899 DAY v. SINGLETON.

A creditors' action for the administration of Dunn's estate was commenced in the Chancery Division, and, on July 26, 1897, the usual judgment for administration was pronounced.

On June 11, 1897, Day was informed that he could not have the bar. After some correspondence in which Day insisted on specific performance, with compensation for the loss of the bar, the defendant Singleton, by his solicitors, on November 2, 1897, required Day to elect whether he would complete the contract or rescind it; and, on December 7, 1897, Singleton's solicitors, receiving no answer, sent Day notice rescinding the contract and offering to return his deposit with interest, and to pay any costs he had incurred.

A cheque for the deposit and interest was sent to Day, but it miscarried.

On December 14, 1897, Mr. Lee, the lessors' agent, wrote to Singleton's solicitors pressing for the rent which was in arrear, and on the 15th they wrote in answer a long letter setting out all that had taken place since Dunn's death, and explaining the then position of affairs. They concluded by stating that they had taken the necessary steps to rescind the contract with Day, "but, in the view of possible future litigation with them, we may ask the governors whether, taking into consideration all the circumstances, they would or would not be satisfied with him as a tenant if the contract was still in existence." On the same day Mr. Lee replied that he did not think there was the least probability that Day would be accepted as a tenant.

Day, in ignorance of this correspondence, on December 20, 1897, issued the writ in the present action against Singleton, Dunn's administrator pendente lite, claiming specific performance of the contract of April 1, 1897, with compensation.

On January 14, 1898, the statement of claim was delivered. On January 27, 1898, Singleton put in his defence, stating that the lessors would not consent to the transference either of the existing lease or of the proposed new lease. On February 2, 1898, the plaintiff delivered his reply.

On July 9, 1898, Day delivered an amended statement of claim, adding Dunn's executors as defendants. He then

alleged that Singleton, instead of doing his best to obtain the consent of the lessors to the assignment to him, the plaintiff, and in breach of his duty towards him, the plaintiff, endeavoured to induce and did induce the lessors to refuse to consent to an assignment to him, the plaintiff: that the defendants had since resold the premises for a larger sum than 6500*l.*, the price mentioned in the contract with him: and that Singleton had, by reason of such fraudulent and improper conduct, prevented the performance of the contract. The plaintiff, abandoning his previous claim for specific performance, claimed instead damages—that is to say, loss of profit on resale, and the expenses of investigating title, and also return of the deposit of 325*l.* with interest. After putting in the defence to the original statement of claim, namely, on March 8, 1898, Singleton's solicitors again wrote to Mr. Lee referring to the action and asking whether the governors would or would not accept Day as a tenant; and on March 10 Mr. Lee wrote in reply that they would not. A copy of this letter was sent to the plaintiff's solicitor on March 18. In their defence to the amended claim afterwards put in, the defendants denied any breach of duty on Singleton's part. Issue was then joined, and the action came on for trial before Romer J.

Mr. Lee was not called as a witness, and no evidence was given to shew what the lessors would have done if they had been asked to accept Day as their tenant, and if they had been told that Dunn's representatives were desirous of completing the sale, making proper compensation for the loss of the bar, which was what Day required. On the other hand, it appeared that Dunn's executors had sold the hotel premises and business to other persons for 6825*l.*, i.e., for 325*l.* more than Dunn had agreed to sell them with the bar to Day. Romer J., in giving judgment, held that there had been no bad faith on the part of Dunn's representatives, and that the case fell within *Bain* v. *Fothergill* (1), and accordingly that the plaintiff was not entitled to damages for the loss of his bargain, but could only prove as a creditor against Dunn's estate for

(1) L. R. 7 H. L. 158.

C. A. 1899 DAY v. SINGLETON.

the deposit of 325*l.*, with interest at 5 per cent. per annum, and the costs of investigating the title.

From that decision the plaintiff appealed.

The appeal was heard on June 29, 30, 1899.

Neville, Q.C., *Bray*, Q.C., and *Ward Coldridge*, for the plaintiff. The question is as to the effect of *Bain* v. *Fothergill* (1) and *Flureau* v. *Thornhill*. (2) What is the duty of a vendor? It is to take all steps within his power to complete his contract, and, where the subject of the sale is leasehold property, he is under an obligation to do his best to obtain the lessor's approval, where required, to an assignment to the purchaser; and if he fails in this duty, the purchaser is entitled to damages for the loss of his bargain: *Lehmann* v. *McArthur* (3); *Williams* v. *Glenton* (4); *Godwin* v. *Francis*. (5) In *Engel* v. *Fitch* (6) it is distinctly laid down by Cockburn C.J. in delivering the judgment of the Court (7), and referring to what was said by Lord Wensleydale and Alderson B. in *Robinson* v. *Harman* (8), that as a general rule a vendor who, from whatever cause, fails to perform his contract is bound to place the purchaser, so far as money will do it, in the position he would have been in if the contract had been performed. That, we submit, is the true principle. The only qualification of it is that laid down in *Flureau* v. *Thornhill* (2), that, if the vendor is incapable of making a good title, the intending purchaser is not entitled to any compensation for the loss of his bargain beyond the expenses he has incurred; any other damages must be the subject of an action for deceit: *Bain* v. *Fothergill* (9), affirming *Flureau* v. *Thornhill* (2) and overruling *Hopkins* v. *Grazebrook*. (10) The actual decision in *Bain* v. *Fothergill* (1) does not affect us, for the rule that the purchaser is not entitled to damages for loss of his bargain is there confined to cases where there has been no fraud or bad faith on the part of the

(1) L. R. 7 H. L. 158.
(2) (1776) 2 W. Bl. 1078.
(3) (1868) L. R. 3 Ch. 496, 500, 503.
(4) (1866) L. R. 1 Ch. 200, 208-9.
(5) (1870) L. R. 5 C. P. 295, 306.
(6) (1868) L. R. 3 Q. B. 314; (1869) 4 Q. B. 659.
(7) L. R. 3 Q. B. 330.
(8) (1848) 1 Ex. 850, 855.
(9) L. R. 7 H. L. 158, 170, 200, 203–4, 205, 208, 209.
(10) (1826) 6 B. & C. 31.

vendor. Here there has been at least bad faith, for it was evidently the letter of December 15, 1897, from Singleton's solicitors to the lessors' agent that procured the lessors' refusal.

[*Rowden, Q.C.*, for the defendant, called attention to the passage from Sedgwick on Damages, 4th ed. p. 234, quoted by Lord Chelmsford in *Bain* v. *Fothergill*. (1)]

That passage does not support the position Lord Chelmsford takes up. Sedgwick is referring to an exception to the rule that you can get damages for the breach of a contract; but Lord Chelmsford has misread this passage. Applying the principles laid down by the authorities, and especially having regard to the letter of December 15, 1897, we submit that Singleton failed in his duty as vendor, and that therefore the plaintiff is entitled to a remedy against him in damages beyond the expenses he has incurred.

Rowden, Q.C., and *Jason Smith*, for the defendants. Unless the purchaser can shew that the vendor has been guilty of fraud or bad faith *Bain* v. *Fothergill* (2) applies.

[LINDLEY M.R. This case seems to depend upon the correspondence.]

There is no charge of fraud against Dunn himself, and the correspondence does not shew, on the true construction of it, any fraud or bad faith on the part of his representatives. In the Court below fraud was suggested, but it is not now pressed, and in fact there is no evidence of fraud: moreover, the learned judge held that there was no bad faith on the part of Dunn's representatives. There is nothing to shew that Singleton or any other of the defendants procured the withholding of the consent of the governors. As to *Engel* v. *Fitch* (3), it was certainly questioned in *Bain* v. *Fothergill* (4); but at all events, it is not like this case: there the question was merely one of conveyancing, and the decision was that where the vendor is perfectly well able to make a title, and the difficulty is only a matter of conveyancing, then, if he can and will not make a title, the purchaser may possibly get more than the strict damages.

(1) L. R. 7 H. L. 206.
(2) Ibid. 158.
(3) L. R. 3 Q. B. 314; 4 Q. B. 659.
(4) L. R. 7 H. L. 209.

C. A. 1899 DAY v. SINGLETON.

This case falls exactly within the rule laid down in *Bain* v. *Fothergill* (1), namely, that if a vendor, without fraud, is incapable of making a good title, the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain. And the passage from Sedgwick, quoted by Lord Chelmsford (2) and upon which there was no adverse comment either by Lord Chelmsford or by Martin B., says that on this question of damages the line has repeatedly been drawn between the case of a vendor acting in good faith and failing to perform his contract because he cannot make a title, and the case of a vendor whose conduct is tainted with fraud or bad faith: in the former case the purchaser may recover only what has been paid by him, with interest and expenses; but in the latter case he is entitled to damages for the loss of his bargain. The crucial words of Lord Chelmsford's speech in *Bain* v. *Fothergill* (1) are where he says (3), that on a review of the authorities the rule is that even if a person enters into a contract for sale of real estate knowing he has no title to it nor any means of acquiring it, still the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract: he can only obtain other damages by an action for deceit. That passage has only once since been the subject of judicial comment, and that was in *Gas Light and Coke Co.* v. *Towse* (4), where Kay J., after referring to it, added, "In an action for deceit, as is well known, you have to prove actual fraud," and he held that the authorities were clearly against the claim in the case before him for damages for breach of contract.

Neville, Q.C., in reply. The question in *Bain* v. *Fothergill* (1) does not arise here. There the vendor was unable to perform his contract for the assignment of a lease because it turned out that the lessors refused their assent; but here the non-performance has been caused by the vendor's representatives having procured the lessors' refusal to grant a new lease, for that must be the true meaning of the letter of December 15, 1897. Dunn's representatives had a double duty to perform, a

(1) L. R. 7 H. L. 158.
(2) Ibid. 206.
(3) L. R. 7 H. L. 207.
(4) (1887) 35 Ch. D. 519, 542–3.

duty to their estate as well as a duty to the plaintiff as the purchaser from their testator, but their duty to the plaintiff was superior to their duty to their estate, and it is for their neglect of this paramount duty that we claim to be entitled to damages.

July 14. LINDLEY M.R., in delivering judgment on behalf of himself and Rigby L.J., said:—The question raised by this appeal is whether a purchaser of leasehold property which the vendor cannot assign without a licence from his lessor is entitled to damages (beyond the return of the deposit with interest, and expenses) by reason of the vendor's omission to do his best to procure such licence.

The facts are as follows. [His Lordship stated them down to and inclusive of the delivery of the plaintiff's reply on February 2, 1898, and continued:—]

Pausing here, let us consider the rights of the parties at this time.

Day was willing to complete if he could obtain the new lease and compensation for the loss of the bar. But it is obvious that he was not willing to complete if he could not get the new lease, and that he did not take the risk of obtaining or not obtaining the lessors' consent to its transfer to him. He was not, therefore, in a position to succeed in his action if such consent could not be obtained. If, however, the lessors' consent could be obtained, Singleton had no defence to Day's action. Singleton's notice to rescind did not deprive Day of his right to specific performance with compensation for loss of the bar, if the lessors' consent could be obtained.

It was Singleton's business, as Dunn's representative, to obtain that consent if he could: see *Lehmann* v. *McArthur* (1), although it was not necessary to obtain it until the time for completing the assignment to Day had arrived: see *Ellis* v. *Rogers*. (2) If Singleton could not obtain the consent, then, as already stated, specific performance would be impossible, and Day's action as it stood must have failed; and in such case Day could only have recovered back his deposit and

(1) L. R. 3 Ch. 496. (2) (1885) 29 Ch. D. 661.

C. A. 1899 DAY v. SINGLETON. Lindley M.R. Rigby L.J.

interest and the cost of investigating the title. This is shewn by *Bain* v. *Fothergill*. (1) But if Singleton could have got the lessors' consent and would not—still more, if the refusal of that consent was procured by Singleton—Day would have had a right of action for damages against Singleton for a breach of his duty to obtain the lessors' consent, it being in his power to obtain it. In such an action (unless *Bain* v. *Fothergill* (1) extends to it, which I will consider presently) the measure of damages would not be confined to the deposit and interest, and costs rendered useless; but the measure of damages would be the loss occasioned by not obtaining the lease, with compensation for the absence of the bar. Singleton never asked the lessors to accept Day as their tenant without a bar, and consequently it would be for him, Singleton, to shew that if he had asked them they would have refused. We pass on. [His Lordship then proceeded with the statement of facts, commencing from the delivery by Day of his amended claim on July 9, 1898, and continued:—]

Romer J. did not think that the plaintiff had proved that Singleton, by his solicitors, had induced the lessors to decline to accept Day as their tenant; and the learned judge considered that the case fell within *Bain* v. *Fothergill*. (1) He took a very charitable view of the letter of December 15, 1897; but, even taking this view of it, Singleton certainly made no effort to obtain the lessors' consent to the required assignment without a bar, as it was his duty to do. But for that letter, there is no reason to suppose that Day would not have been accepted as a tenant without a bar; and it ought to be inferred as against Singleton that the lessors would have accepted Day if Singleton had asked them to do so.

Having regard to this circumstance, we do not think that *Bain* v. *Fothergill* (1) covers this case. There the vendors did all they could to obtain the lessors' consent to the assignment, and they failed to obtain it. (2) The first question submitted to the judges (3) shews that what was being considered was the rule as to damages on the sale of real estate where a vendor

(1) L. R. 7 H. L. 158. (2) L. R. 7 H. L. 175.
(3) L. R. 7 H. L. 170.

without his default is unable to make a good title. Lord Chelmsford's speech is addressed to that question; and his observations on fraud (1) are part of his comment on *Hopkins* v. *Grazebrook* (2), which had decided that the exceptional rule laid down in *Flureau* v. *Thornhill* (3) did not apply where the vendor knew that he had not a good title, although he believed he could get one, and had in fact an equitable title. Neither Lord Chelmsford's speech nor Lord Hatherley's is an authority for the application of that exceptional rule to the case of a vendor who can make good title but will not, or will not do what he can do and ought to do in order to obtain one. Such a case is, however, covered by *Engel* v. *Fitch* (4), which was to a certain extent based on *Hopkins* v. *Grazebrook* (2), and was much commented on in, but not overruled by, *Bain* v. *Fothergill*. (5)

These observations do not, however, dispose of this case. They render it necessary to consider another difficulty, which is this. If Dunn's representatives had tried to obtain the lessors' consent and had failed, Day could have obtained no more damages than those he has recovered. The damage to him is occasioned by his not obtaining what he was entitled to by his contract; and so far as damages are concerned the reason why he fails to obtain what he bargained for is immaterial. The damage is the same whatever that reason may be. Why, then, should he obtain more damages if no attempt is made to obtain the lessors' consent than he would be entitled to if a proper effort to obtain such consent had been made and had failed? The only reason which can be assigned for deciding that he is entitled to more is that the rule which limits his damages in the first case is itself an anomalous rule based upon and justified by difficulties in shewing a good title to real property in this country, but one which ought not to be extended to cases in which the reasons on which it is based do not apply. This answer to the question with which we are dealing appears to us sufficient and satisfactory. The answer

(1) L. R. 7 H. L. 206–7.
(2) 6 B. & C. 31.
(3) 2 W. Bl. 1078.
(4) L. R. 3 Q. B. 314; 4 Q. B. 659.
(5) L. R. 7 H. L. 158.

C. A. 1899 DAY v. SINGLETON. Lindley M.R. Rigby L.J.

may possibly be difficult to reconcile with some of Lord Chelmsford's observations in *Bain* v. *Fothergill* (1), but the answer is, in our opinion, quite consistent with the decision in that case, and it has the merit of preventing the rule there upheld from leading to grievous injustice.

We come, therefore, to the conclusion that the judgment appealed from ought to be reversed, except so far as it relates to the deposit; and that it ought to be declared that the plaintiff is entitled to the damages which he has sustained by reason of the omission of the defendant Singleton to obtain the consent of the governors of the Charterhouse to the assignment to the plaintiff of the lease referred to in the memorandum of April 1, 1897, without the bar which the said governors would not allow the plaintiff to have.

Then there must be an inquiry to ascertain the amount of these damages, and the defendant Singleton must be ordered to pay them. He must look for his indemnity to Dunn's estate.

As regards the costs, the plaintiff is entitled to the costs of the appeal and to the costs of the action, and the defendants must look to Dunn's estate for their indemnity.

SIR F. H. JEUNE stated the facts, and after reading the correspondence, continued:—The action, therefore, as it now stands is a claim for damages based on the refusal by the administrator to carry out Mr. Dunn's contract, and on his not only failing to do his best to obtain the consent of the lessors to the assignment to Day, but inducing the lessors to refuse such consent.

I have stated the facts of the case at some length because I am compelled to differ from the learned judge in the Court below as to the proper inference to be drawn from the facts and correspondence to which I have referred. To me it appears abundantly clear that the administrator's solicitors, acting on his behalf, did not use their best endeavours to obtain the lessors' consent, but on the contrary endeavoured, and I think successfully endeavoured, to induce the lessors

(1) L. R. 7 H. L. 158.

through their agent, Mr. Lee, to refuse that consent. It should be mentioned that on April 2, 1897, Messrs. Roscoe & Hincks wrote to Mr. Lee recommending Mr. Day as an assignee, and stating that they were informed that he was a man of respectability and good means. It was then their interest to get Mr. Day accepted as a tenant; but by December 15 it was greatly to the interest of the estate which they represented to induce the governors to refuse their consent. Not only could they so, and only so, get rid of the impending action for specific performance and compensation to which, as far as I can see, they had no answer; but they would also be made free to sell their property on more advantageous terms. I do not think it possible that an experienced and astute solicitor, such as Mr. Lee doubtless is, could fail to understand the drift of the letter of December 15, or to see that the administrator was asking the governors to refuse their consent on account of the great advantage which such refusal would be to him, and also the advantage which he suggests it would be to the governors; and I cannot, as a matter of common sense, refuse to connect the refusal which promptly followed with the letter of December 15. The learned judge below was struck with the fact that Mr. Lee was not called by the plaintiff. It appears to me that it was for the defendants to call him to refute, if they could, the strong presumption arising from the letters, and to shew, if they could, that something other than Messrs. Roscoe & Hincks' representations induced the governors to refuse their assent.

It was argued before us that the letter of December 15 was written bonâ fide in the interests of Mr. Dunn's estate. I have no doubt that it was; but, as Mr. Neville pointed out in his forcible reply, Mr. Singleton had a duty to Mr. Day superior to that to Mr. Dunn's estate, and it was just because he was zealous in regard to his duty to that estate that he failed in his duty to the person with whom Mr. Dunn had contracted.

But now comes the question whether, on the facts as I have found them, an action lies at the suit of the plaintiff, and an action in which full damages can be received; and it is

C. A. 1899 DAY v. SINGLETON. Sir F. H. Jeune.

contended that the case of *Bain* v. *Fothergill* (1) is a conclusive authority against such a proposition.

The effect of the decision in *Bain* v. *Fothergill* (1) is, I think, summed up in saying that it overruled the exception which the Court in the case of *Hopkins* v. *Grazebrook* (2) had sought to engraft on the rule laid down in the case of *Flureau* v. *Thornhill*. (3) What that exception was may be stated in the words of Lord Chelmsford in his speech in *Bain* v. *Fothergill* (4): "The exception which the Court, in *Hopkins* v. *Grazebrook* (2), engrafted upon the rule in *Flureau* v. *Thornhill* (3), has always been taken to be this: that in an action for breach of a contract for the sale of a real estate if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain." As the law therefore now stands, limited damages only can be recovered in an action for breach of contract for sale of real estate, whether or no the vendor knows that he had no title to the thing contracted to be sold. Lord Chelmsford indeed in his speech (5) was led to regard the rule laid down in *Flureau* v. *Thornhill* (3) as without exception. "I think," he said, "the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit."

But the present action is not, I think, to be regarded as an action for breach of contract to sell the lease of the hotel in question. It is really an action against Mr. Singleton for failing in his duty to obtain, if he could, the consent of the Charterhouse to a transfer.

I do not think it can be doubted that it is the duty of a vendor to make a good title for his purchaser if he can, and

(1) L. R. 7 H. L. 158.
(2) 6 B. & C. 31.
(3) 2 W. Bl. 1078.
(4) L. R. 7 H. L. 206.
(5) L. R. 7 H. L. 207.

certainly not to do anything to impair or spoil such title. The emphatic words of Turner L.J. in *Williams* v. *Glenton* (1) have been often referred to: "The vendor, however, is bound to complete the contract, and if he does not take the steps which are necessary to enable him to do so, he is liable for damages upon the contract; and heavy damages would be given if, having the means of completing the sale, he should decline to take the proceedings necessary for that purpose." It may perhaps be doubted if the expression of opinion that the vendor is liable for damages *upon the contract* does not conflict with the dicta of Lord Chelmsford, but the expression of the duty of the vendor leads to no such conflict.

In *Lehmann* v. *McArthur* (2) Page Wood L.J. said: "It was the duty of Mr. McArthur"—the vendor in that case—"to do his best to obtain the landlord's consent."

The case of *Engel* v. *Fitch* (3), decided by the Court of Queen's Bench and the Exchequer Chamber, appears to me to be an authority on this point. In that case the mortgagees of a house sold it to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The title was satisfactory, but the mortgagor who was in possession refused to go out, and the vendors refused to oust him by ejectment or to complete the sale. It was held that the rule in *Flureau* v. *Thornhill* (4) did not prevent the purchaser from recovering damages for the loss of his bargain. It is quite true that in the judgment of Kelly C.B. may be found words which approve the decision in *Hopkins* v. *Grazebrook* (5); but the case of *Engel* v. *Fitch* (3) appears to me to rest on ground quite different from that taken in *Hopkins* v. *Grazebrook*. (5) It turned, not on the knowledge of the vendor of his want of title, but on his failure to do his best to carry out his contract.

Nor does the case of *Bain* v. *Fothergill* (6) at all conflict with this view of the duty of a vendor. The decision in that case clearly does not. The words of Lord Chelmsford are, no doubt, very general, but they may be understood to refer to the

(1) L. R. 1 Ch. 200, 209.
(2) L. R. 3 Ch. 496, 500.
(3) L. R. 3 Q. B. 314; 4 Q. B. 659.
(4) 2 W. Bl. 1078.
(5) 6 B. & C. 31.
(6) L. R. 7 H. L. 158.

C. A. 1899 DAY v. SINGLETON. Sir F. H. Jeune.

exception which the case of *Hopkins* v. *Grazebrook* (1) sought to engraft on the rule of *Flureau* v. *Thornhill*. (2) Lord Hatherley, on the other hand, repeating, as I think, his former opinion in *Lehmann* v. *McArthur* (3), said, referring to the case of *Engel* v. *Fitch* (4), (5): "The vendor in that case was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance"; but it should be added that his Lordship proceeded to express a doubt whether in *Engel* v. *Fitch* (4) damages were properly given in respect of the loss of his contract. It cannot, I think, be said that the House of Lords in *Bain* v. *Fothergill* (6) overruled the case of *Engel* v. *Fitch*. (4)

I am of opinion that in the present case the vendor's representative distinctly failed in his duty to do his best to obtain the lessors' consent: indeed, he went further, and, as I think, prevented that consent from being given. I can see no reason why he is not liable to an action for this, and why in such an action damages should not be awarded to compensate the plaintiff. Now, what are the damages in the present case? They are not, I think, exactly the damages for the plaintiff's loss of bargain in respect of this hotel. It is true that the defendant did not and could not complete Dunn's contract to sell the hotel with the bar, but this did not arise from the refusal of the Charterhouse to accept the plaintiff as a tenant, but from the terms of the lease to the vendor. What happened was that the plaintiff accepted the position that he could not have the hotel with the bar, and in consequence brought an action for specific performance, with compensation for the loss of the bar. It was in consequence of and in order to defeat this action that Singleton, as I think, resorted to the plan of getting the Charterhouse to refuse to take the plaintiff as

(1) 6 B. & C. 31.
(2) 2 W. Bl. 1078.
(3) L. R. 3 Ch. 496.
(4) L. R. 3 Q. B. 314; 4 Q. B. 659.
(5) L. R. 7 H. L. 209.
(6) Ibid. 158.

tenant, and the result of the refusal necessarily was that the action was rendered abortive. I think that the defendant is liable for the consequence of his conduct, such consequence being that the plaintiff lost, not the hotel with the bar, but a successful result to his action—that is to say, a decree for specific performance with compensation. It seems that the hotel without the bar has been sold for a larger sum than the plaintiff agreed to give for it with the bar, and this fact will be material in estimating the amount of the damages.

I think, therefore, that the judgment of the Court below must be reversed, and judgment entered for the plaintiff, with an inquiry as to damages estimated on the principles which I have indicated.

Solicitors: *W. B. Glasier; Roscoe & Hincks.*

G. I. F. C.

STIRLING J.

1899

May 17, 18; *July* 5.

In re BLAND.
MILLER *v.* BLAND.

[1896 B. 436.]

Executor — Administration — General Bequest to Persons in Succession — Absolute Gift subject to Executory Limitation—Reversionary Interest—Conversion—Enjoyment in Specie.

The reason of the rule in *Howe* v. *Earl of Dartmouth*, (1802) 1 W. & T. 7th ed. p. 68, is not generally applicable to an absolute gift subject to an executory limitation.

By his will a testator gave all his property to his wife, and by a codicil to his will, after reciting that G. M. was the adopted daughter of himself and his wife and that he was desirous of providing for her in the event of his wife dying without issue leaving her surviving, he directed that in such event the gift in his will in favour of his wife should take effect as if the name of G. M. had been substituted therein for that of his wife. Part of the testator's estate consisted of a reversionary interest in a trust fund:—

Held, having regard to the form of the gift in the codicil, that the testator intended that the property should be enjoyed in specie, and that the reversion ought not to be sold.

JOHN BLAND, deceased, by his will dated October 8, 1885, gave and bequeathed to his wife his business and all other his personal property and effects, and appointed her sole executrix of his will.

On June 26, 1886, the testator made a codicil to his will whereby, after reciting that Ghita Millicent Miller was the adopted child of himself and his wife, and that he was desirous of making provision for her in the event of his wife dying without issue leaving the said G. M. Miller surviving her, he directed that in such event all and singular the property comprised in the bequests and devises contained in his will in favour of his wife should take effect as if in such bequests and devises the name of the said G. M. Miller were substituted for that of his wife.

The testator's estate was being administered by the Court in an action brought by Ghita Millicent Miller against the

testator's widow, and it was found by the master's certificate that part of his outstanding personal estate consisted of a reversionary interest expectant on the death of his wife in certain funds subject to the trusts of his marriage settlement, under which the wife took a life interest.

Upon the further consideration of the action the question was raised whether this reversionary interest ought to be sold and the proceeds applied in accordance with the rule in *Howe* v. *Earl of Dartmouth* (1), or whether it was intended to be enjoyed in specie.

Butcher, *Q.C.*, and *F. Thompson*, for the plaintiff. Under the rule in *Howe* v. *Earl of Dartmouth* (1), as stated by Lord Eldon L.C., wasting property is converted for the benefit of the remaindermen and future interests for the benefit of the remaindermen (2); but the rule is confined to a case of tenant for life and remaindermen; it has never been extended to an absolute gift subject to an executory limitation over in a certain event, and we submit that it has no application to the present case.

Further, having regard to the terms of the gift in the codicil, we say that the intention of the testator was that the property should be enjoyed in specie.

This case falls within the principle of *Hinves* v. *Hinves* (3); *Collins* v. *Collins* (4); *Pickering* v. *Pickering* (5); *Harris* v. *Poyner*. (6)

Jenkins, *Q.C.*, and *A. àB. Terrell*, for the defendant. For the purposes of the rule in *Howe* v. *Earl of Dartmouth* (1) there is no distinction in substance between a gift for life with remainders over and an absolute gift with an executory gift over, and that rule has been applied in the latter case by Lord Romilly in *Jebb* v. *Tugwell*. (7) The point, however, does not appear to have been taken in argument, and the decision of the Master of the Rolls was reversed on appeal on other

(1) 7 Ves. 137; 1 W. & T. 7th ed. p. 68.
(2) 7 Ves. 148; 1 W. & T. 73.
(3) (1844) 3 Hare, 609, 611, 612.
(4) (1833) 2 My. & K. 703.
(5) (1839) 4 My. & Cr. 289.
(6) (1852) 1 Drew. 174.
(7) (1855) 20 Beav. 84.

STIRLING J. grounds. (1) There is here no ground for excluding the application of the rule.

1899

BLAND, *In re.* MILLER *v.* BLAND.

[They also referred to *In re Whitehead.* (2)]

Butcher, Q.C., in reply.

Cur. adv. vult.

July 5. STIRLING J., after dealing with another question in the administration of the testator's estate, continued as follows:— Then arises the question as to what is to be done with a reversionary interest in certain trust funds which the master has found to be part of the testator's general estate. The reversionary interest is expectant on the death of the testator's widow, she being tenant for life of the funds in question. That involves the question whether the principles laid down in *Howe* v. *Earl of Dartmouth* (3) are applicable to a will and codicil expressed as these are, in which there is first an absolute gift to the widow followed by a gift over in the event of the widow dying without issue. I am not prepared to say that the rule in *Howe* v. *Earl of Dartmouth* (3) can never apply to a case of an absolute gift subject to an executory limitation; but I think that the inference as to the intention of the testator upon which that rule is based is weaker in such a case than where the testator has given his property to persons successively as tenants for life and remaindermen. And even in a case where the rule in *Howe* v. *Earl of Dartmouth* (3) is strictly applicable, an inference of an intention to the contrary has been drawn from the terms of the gift over. That question was very much discussed by Lord Cottenham L.C. in *Pickering* v. *Pickering* (4), where he refers to the case of *Collins* v. *Collins.* (5) With reference to that he says: "In *Collins* v. *Collins* (5) the gift was 'I give to my wife Sarah Collins all and every part of my property in every shape, and without any reserve, and in whatever manner it is situated, for her natural life; and at her death the property so left to be divided in the following manner, one-half in equal proportions to my father John Collins and so on.'

(1) 7 D. M. & G. 663.
(2) [1894] 1 Ch. 678.
(3) 1 W. & T. 7th ed. p. 68.
(4) 4 My. & Cr. 289, 300.
(5) 2 My. & K. 703.

Now there is no direction there for conversion: there is a gift of property described to be of various qualities, which the wife is to have for her life; and after her death it is to be divided. Sir J. Leach was of opinion that there was a sufficient indication of intention that she should enjoy the property in specie." Then a little further on he says: "It remains, therefore, to see what expressions there are in this will which bring it within *Collins* v. *Collins* (1); but before I do so I will say that I entirely concur in *Collins* v. *Collins* (1), and that I think it would be a violation of the testator's intention not to allow the wife to enjoy the income of the property as it is." And he followed that decision. Having regard to the terms of the gift in the will and in the codicil, I think that the testator has shewn an intention that the property should be enjoyed in specie, and, in my opinion, there ought not to be a sale of this reversion. (2)

Solicitors: *Law & Worssam; W. H. Smith & Son.*

(1) 2 My. & K. 703.

(2) On July 12 the learned judge followed this decision in the similar case of *In re Hammersley, Hasman* v. *Hammersley.*

H. B. H.

KEKEWICH J.

1899

June 21.

In re BLAIBERG AND ABRAHAMS.

[1899 B. 1604.]

Vendor and Purchaser—Title—Notice of Trusts of Mortgage Money—Mortgagee not one of the original Trustees—Joint Account Clause—Objection—Sufficiency.

A contract was entered into for the sale of property which was subject to a mortgage to two persons. The mortgage deed contained the usual statement that the money belonged to the mortgagees on a joint account. By inadvertence it was disclosed to the purchasers that the mortgage money was held on the trusts of a settlement of which the mortgagees were not the original trustees:—

Held, that the purchasers were entitled to require that it should be shewn that the mortgagees were the duly appointed trustees of the settlement.

In re Harman and Uxbridge and Rickmansworth Ry. Co., (1883) 24 Ch. D. 720, distinguished.

ADJOURNED SUMMONS.

By an agreement in writing dated February 14, 1899, and made between Benjamin Blaiberg of the one part and Lewis Abrahams and Alfred Abrahams of the other part, Blaiberg agreed with L. and A. Abrahams for the sale to them of eight freehold messuages or tenements and shops situate in the Green Lanes, Stoke Newington, Middlesex, in fee simple, free from incumbrances, for the sum of 8700*l.*, and March 2, 1899, was appointed as the date for completion of the purchase.

Upon the investigation of the title to the property the following facts appeared.

By an indenture dated October 12, 1880, made between Dean Swift and Charles Rice, as mortgagors of the one part, and Margaret Isabella Langlands as mortgagee of the other part, the property comprised in the contract was conveyed by the mortgagors to the mortgagee by way of mortgage for securing the payment of 6000*l.* and interest.

By an indenture dated May 12, 1882, made between Margaret Isabella Langlands, the mortgagee of the first part, Dean Swift and Charles Rice, the mortgagors of the second part,

and Sir John Edmund Commerell, a rear-admiral in the navy, and Pierse Kelly of Waterford in Ireland, as transferees of the third part, in consideration of 6000*l.* to the mortgagee at the request of the mortgagors paid by the transferees "out of moneys belonging to them on a joint account," the mortgage debt of 6000*l.* and all future interest thereof was transferred to the transferees, and the property was conveyed and confirmed to the transferees subject to the right of redemption subsisting therein.

By an indenture dated May 8, 1886, made between Dean Swift and Charles Rice of the one part, and Mary Ann Partridge of the other part, the property was conveyed to Mary Ann Partridge in fee subject to the mortgage.

By indenture dated September 2, 1898, made between Mary Ann Partridge of the one part, and Benjamin Blaiberg of the other part, the property was conveyed to Benjamin Blaiberg in fee, subject to the mortgage, and Blaiberg covenanted to pay the 6000*l.* and interest secured by the mortgage.

On September 2, 1898, Blaiberg gave notice addressed to Sir John Edmund Commerell and Pierse Kelly of his intention to pay off the mortgage money and interest on March 2, 1899. This notice was sent to Messrs. Thornton & Son of Waterford, the solicitors acting on behalf of the mortgagees. Messrs. Thornton & Son accepted the notice of payment off of the mortgage on behalf of Sir J. E. Commerell and Richard Henry Kelly as being the existing mortgagees.

Messrs. Gordon, Dalbiac & Pugh, acting for Mr. Blaiberg, the vendor, applied to Messrs. Thornton & Son, as representing the mortgagees, for a copy of the transfer of the mortgage to Sir J. E. Commerell and R. H. Kelly, and of any intermediate transfer, and at the same time requested them to send the deeds to their agents in London for production to Mr. Edward Le Voi, the purchasers' solicitor. Messrs. Thornton & Son only sent the copy of the transfer of mortgage of May 12, 1882, and at the same time stated that Mr. Pierse Kelly was dead, and that by deed of appointment of September 7, 1892, Mr. R. H. Kelly was appointed in his place, that the mortgage was, therefore, vested in him and Sir J. E. Commerell, and that

KEKEWICH J.

1899

BLAIBERG AND ABRAHAMS, *In re.*

the deeds had been sent to their agents, Messrs. Lewin & Co., of 32, Southampton Street, Strand. Messrs. Gordon & Co. thereupon requested Messrs. Lewin & Co. to produce the deeds to Mr. Le Voi, and to furnish him with a copy of the deed of September 7, 1892, which they accordingly did. Shortly afterwards Mr. Le Voi called on Messrs. Gordon, Dalbiac & Pugh and informed them that by the copy deed which had been forwarded by Messrs. Lewin & Co., it appeared that the deed was an appointment of new trustees of a marriage settlement, and did not include any transfer of the mortgage debt, and that by reason of the appointment having been produced notice was given to him that the mortgage money was trust money held under the marriage settlement of Mr. and Mrs. Bloomfield.

Mr. Le Voi made the following requisition (amongst others) on the title on behalf of the purchasers :—

"(*a.*) Having regard to the indenture of appointment of new trustees of September 7, 1892, the purchasers require an abstract of the marriage settlement of June 20, 1848, recited in such appointment, and an opportunity of comparing the same with the original. This is necessary to enable the purchasers to be satisfied that Mr. and Mrs. Bloomfield had power to appoint a new trustee, and that such new trustees are duly appointed and are in a position to give a valid receipt for the mortgage moneys. There must also be an acknowledgment as to the purchasers' right to production of this marriage settlement and deed of appointment.

"(*b.*) The mortgage of October 12, 1880, must be properly transferred to Messrs. R. H. Kelly and Admiral Commerell before completion and the transfer duly stamped and produced for examination, and an abstract thereof supplied.

"(*c.*) Such transfer must be duly registered in the Middlesex Registry at the vendor's expense before completion."

In accordance with requirement (*a.*), Messrs. Gordon, Dalbiac & Pugh applied to Messrs. Lewin & Co. for an abstract of so much of the settlement as shewed the power to invest on mortgage of real estate, the power to give receipts, and the power to appoint new trustees. This abstract was accordingly furnished to Mr. Le Voi.

On Mr. Le Voi examining the abstract with the original settlement, he found that the power to appoint new trustees required that the deed of appointment should be executed in the presence of two or more credible witnesses, but that the deed of September 7, 1892, had been executed by the appointors in the presence of only one witness. Mr. Le Voi thereupon wrote to Messrs. Gordon, Dalbiac & Pugh the following letter:—

"*Blaiberg to Abrahams.*

"I have now received an abstract of the marriage settlement of Mr. and Mrs. Bloomfield from Messrs. Lewin & Co., and to-day attended to inspect the original. The following points arose on such abstract and the inspection:—

"(1.) It is provided that all appointments of new trustees by Mr. and Mrs. Bloomfield shall be sealed and delivered by them in the presence of two or more credible witnesses. The appointment of September 7, 1892, is only attested by one witness to each signature, and is therefore bad. How is it proposed to get over this difficulty?

"(2.) The trustees appointed by the settlement are Charles John Bosanquet, William Godfrey Whatman, William Augustus Commerell and the Hon. John Knox. It must be shewn how these gentlemen have been got rid of, and how Mr. Pierse Kelly and Sir John E. Commerell became appointed trustees of the settlement in question. Abstracts of any appointment of new trustees since the date of the settlement must be supplied and an opportunity afforded of examining such abstracts with the original appointment.

"(3.) Any question arising on or replies to the above and on the examination of the abstracts supplied are reserved.

"I much regret having to raise the above, but it seems to me that I cannot in safety complete until these points are satisfactorily cleared up."

The vendor's solicitors replied to the requisition by stating that the purchasers were not affected by the trust, which had been revealed by mistake, and that all that had in effect happened was that one of the joint mortgagees had died, and

KEKEWICH J.

1899

BLAIBERG AND ABRAHAMS, *In re.*

the survivor, Sir J. E. Commerell, could give a good discharge for the money due upon the mortgage.

Nothing further was done in the matter, and on April 19, 1899, this originating summons was taken out by the vendor under the Vendor and Purchaser Act, 1874, asking that it might be declared that the requisitions on title had been sufficiently answered, and that Sir J. E. Commerell, as surviving mortgagee, could give a good discharge for the money due upon the mortgage of the hereditaments comprised in the contract of February, 1899.

R. F. Norton, for the vendor. The purchasers are not entitled to require evidence as to the validity of the appointment of Sir John Commerell and his deceased co-mortgagee, Mr. Pierse Kelly, to be trustees of the settlement of June 20, 1848. It is sufficient for them that Commerell and Kelly advanced the money as mortgagees with a proper joint account clause, that the death of Kelly is proved, and that the survivor receives the money. It was expressly decided in *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (1) that it is contrary to the practice of the Court to go behind a recital evidently framed for the purpose of keeping notice of the trusts of the mortgage money off the conveyance. There has been no transfer of the mortgage, and if Mr. R. H. Kelly has not been duly appointed a trustee there is no one who can call for a transfer. Nothing at all has occurred in relation to the mortgage except that one of the joint mortgagees has died. The trusts of the settlement, though disclosed to the purchasers, do not appear on any document of title, nor need they do so, unless the purchasers are so ill-advised as to insist on reciting it in their own conveyance.

Warrington, Q.C., and *Solomon*, for the purchasers. Under all the circumstances of this case the purchasers cannot safely complete unless evidence is given to shew that the mortgagees under the deed of May 12, 1882, were duly appointed trustees of the settlement of June 20, 1848. The case is altogether distinguishable from *In re Harman and Uxbridge and Rickmans-*

(1) 24 Ch. D. 720.

worth Ry. Co. (1) In that case all that was disclosed was that the vendor was a trustee. But in the present case, not only is the nature of the trusts disclosed, but it further appears that Sir John Commerell and Mr. P. Kelly (the deceased mortgagee) were not originally trustees of the settlement. The purchasers are therefore entitled to evidence shewing that the trust money was properly in the hands of those gentlemen, and this can only be done by shewing that they were duly appointed to be trustees of the settlement. The effect of the notice to the purchasers is to bring the trusts upon the title, and to place the purchasers in precisely the same position as they would have been in if the trusts had been recited in the deed of May 12, 1882. It is unfortunate that this slip should have been made, but, having been made, it can only be remedied in the way indicated by the purchasers.

Norton, in reply. The objection of the purchasers would have been intelligible if there had been a transfer of the mortgage reciting the trusts, but there has been no such transfer. It is incorrect to say that the trusts have been brought on the title to the land. On the face of the deeds the title is clear of any trusts, precisely in the same way as the title in *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (1) was, and that case is directly in point.

KEKEWICH J. The property in question in this case was subject to a mortgage, in favour of Sir John Edmund Commerell and Mr. Pierse Kelly, which contained the usual statement that the money advanced belonged to them on a joint account, and, accordingly, Mr. Pierse Kelly having subsequently died, Sir John Commerell by the terms of the deed would now be entitled to give a receipt for the mortgage money. It may be that if, contrary to the usual and more cautious form, the mortgage deed had contained a recital shewing that the mortgagees held the money as trustees on the joint account there would nevertheless have been no difficulty, the payment being now to be made to the survivor of the two trustees. But by an unfortunate slip the trusts of the

(1) 24 Ch. D. 720.

KEKEWICH J.

1899

BLAIBERG AND ABRAHAMS, *In re.*

settlement under which the mortgagees held the money have been disclosed, and the disclosure so made shews not only who are entitled beneficially, but also that Sir J. E. Commerell and Mr. P. Kelly were not the original trustees of the settlement. It may be that they never were trustees. It may be that they held the money as trustees for the duly appointed trustees. It is not shewn that at the date of the mortgage they were the properly appointed trustees of the settlement. It follows that there is nothing now to satisfy the purchaser that Sir John E. Commerell is the surviving trustee of the settlement. Is the purchaser entitled to ask whether that is so? It is better perhaps to put the matter a little more strongly, and to inquire whether he is bound to ask it for his reasonable protection. He is not so bound, if he will get a discharge from Sir John Commerell. He will get such a discharge if Sir John is the surviving trustee, but not otherwise. Mr. Norton argues with perfect soundness that Sir John Commerell has acknowledged himself to be a trustee, and therefore he is trustee for the persons entitled under the settlement. But that does not shew that he is a person capable of giving a discharge, the trusts—not merely the beneficial interests, but the title of the trustees—having been disclosed. The risk in this case I have no doubt is trifling. Still a purchaser cannot be too careful, and if it should turn out that there is some flaw, then the purchase-money will not have been paid to the trustees de facto and de jure, and the result would be, if any difficulty arose, that the purchasers would have to shew that Sir John E. Commerell had accounted for the money to the persons entitled under the settlement. Perhaps I ought to say that I think that the case of *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (1) does not govern this case, because there the trust deed was not disclosed. All that was disclosed was that the testator was a trustee, and it did not appear that any persons other than the testator ever had anything to do with the trust. If there, as here, the trusts had been disclosed, it might have been necessary, notwithstanding the reluctance of Pearson J.—a reluctance which I also feel in this case—to go into the title.

(1) 24 Ch. D. 720.

The objection taken is extremely technical, and the result of a mere slip, but I cannot say that the purchasers are wrong in desiring to have a complete discharge, and I think the vendor ought to give it to them. There must therefore be a declaration that the requisitions have not been satisfactorily answered.

Solicitors: *Gordon, Dalbiac & Pugh; Edward Le Voi.*

C. C. M. D.

In re MAYNARD'S SETTLED ESTATE.

[1899 M. 022.]

Minerals—Settled Estate—Lease—Open or Unopened Mine—Pieces of Land separated by narrow Strip belonging to different Owner—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 4.

An estate settled by the will of a testator comprised two pieces of land separated by a narrow intervening strip of land which belonged to different owners. Under the whole of the lands there was a valuable seam of coal. The piece of land on the north side of the strip had been demised by the settlor to a colliery company, who had worked the coal. The piece of land on the south side of the strip had not been demised by the settlor, nor had the coal thereunder been worked in any way; but it appeared that if the intervening strip had belonged to the testator the coal could have been worked from the pit or shaft sunk by the colliery company. On a petition by the tenant for life under the will for the sanction of the Court, under the Settled Estates Act, 1877, to a proposed mining lease of a portion of the land on the south side of the strip:—

Held, that, by reason of the intervention of the strip of land, the mine to be leased must be deemed to be a separate unopened mine, and that therefore three-fourths of the rent under the lease must be set aside and invested.

PETITION under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), for the sanction of the Court to a proposed mining lease.

Under the will and codicils of Henry, Viscount Maynard, who died on March 19, 1865, a freehold estate, known as the Bagworth estate, became vested in the petitioner, Frances Evelyn, Countess of Warwick, as tenant for life in possession,

KEKEWICH J. 1899 MAYNARD'S SETTLED ESTATE, *In re.*

with remainder to her son Leopold G. F. Maynard (commonly called Lord Brooke), an infant, as tenant in tail in remainder expectant on the decease of the petitioner.

The Bagworth estate comprised two pieces of land situate near to the Midland Railway. These two pieces of land were separated from one another by an intervening narrow strip of land which did not form part of the estate, but belonged to different owners. The two pieces of land were coloured pink, and the intervening strip blue, on a plan referred to in the petition.

Under the whole of the lands coloured pink and blue there lay a valuable vein or seam of coal known as the "lower main seam."

The piece of land coloured pink, situate to the north of the strip coloured blue, had been leased by the testator, Viscount Maynard, to the Bagworth Coal Company, who had worked the "lower main seam." The other piece of land coloured pink, situated to the south of the strip coloured blue, had not been leased by Viscount Maynard, nor had the coal thereunder been worked in any way. It appeared from the evidence of skilled witnesses that, but for the intervention of the strip coloured blue, there was nothing to prevent the working of the "lower main seam" to the south of the strip from the existing pit or shaft, but that as a matter of commercial convenience, having regard to the situation of the seam, the proximity of the railway, and other circumstances, it would be more advantageous to carry on such working by means of a new pit or shaft to be sunk at a place near to the railway and indicated on the plan.

The petitioner had, subject to the sanction of the Court, entered into a conditional contract for the grant to one Henry Bramall of a mining lease of a portion (coloured dark pink on the plan) of the land to the south of the strip, and the petition was presented for the approval of the Court to the proposed lease. The land immediately to the south of the strip was not included in the lease, as it was considered that it could more conveniently be worked by the Bagworth Coal Company.

Subsequently to the decease of Viscount Maynard the peti-

tioner had acquired the "lower main seam" under the strip coloured blue.

On the petition coming on for hearing, the Court approved of the proposed lease. The question then arose whether the subject-matter of the lease ought to be treated as an open mine, in which case, under s. 4 of the Act, one-fourth only of the rent would have to be set aside and invested, or as an unopened mine, in which case three-fourths of the rent would have to be set aside and invested.

Warrington, Q.C., and *Darlington*, for the petitioner, the tenant for life. The mine proposed to be demised ought to be treated as an opened mine, and only one-fourth of the rent ought to be set apart and invested. It is clear upon the authorities that, but for the intervention of the strip of land coloured blue, this seam of coal is an open mine, and none the less so because it is proposed to work this portion of it by a new pit or shaft. It is submitted that the intervention of the strip makes no difference. It is obvious from the nature of the property that in order to work the coal under the two pieces of land the owner must in some way or other acquire a right to go through the strip coloured blue. The evidence shews that but for the intervention of the strip the coal could be worked from the existing pit or shaft, and that the sinking of a new pit or shaft is a matter of commercial convenience only and not of necessity. There can be no doubt that if the testator had owned the strip coloured blue he would nevertheless have worked this part of the seam by sinking a new pit or shaft convenient of access to the Midland Railway. The fact that it is convenient to work the seam by sinking a new pit rather than by continuing the levels from the old pit does not prevent the mine from being an old mine. The cases of *Spencer* v. *Scurr* (1), *Bagot* v. *Bagot*, *Legge* v. *Legge* (2), and *Earl Cowley* v. *Wellesley* (3), are authorities to that effect, and are treated by Lord Selborne in *Elias* v. *Snowdon Slate Quarries Co.* (4) as establishing

(1) (1862) 31 Beav. 334.
(2) (1863) 32 Beav. 509.
(3) (1866) 35 Beav. 635; L. R. 1 Eq. 656.
(4) (1879) 4 App. Cas. 454, 466.

KEKEWICH J.

1899

MAYNARD'S SETTLED ESTATE, *In re.*

the proposition that "the sinking a new pit or breaking ground in a new place on the same rock is not necessarily the opening of a new mine or a new quarry." *Campbell* v. *Wardlaw* (1) may be cited as an authority against us; but the true meaning of that case is that the mere fact that the tenant for life is going to work mines on the same estate as that on which mines were worked by the settlor does not make the new working a continuation of the former working. We do not say that because the testator, Lord Maynard, opened mines on one part of his estate, the tenant for life may now open mines on other parts, but that the mine now proposed to be opened is the same mine as that which was opened by the testator.

P. O. Lawrence, *Q.C.*, and *F. L. Wright*, for the infant tenant in tail. This is the opening of a new mine, and therefore three-fourths of the rent ought to be set aside and invested. We admit that the opening of a new pit does not constitute the mine a new mine; but in this case the seam of coal which it is now proposed to work is physically and legally separated from the seam of coal worked by the colliery company. At the death of the testator—which is the point of time to be considered—it was impossible for him to get to this coal except by trespassing on the strip of land coloured blue, or by commencing entirely new mining operations. This mine, therefore, was at the time of the testator's death as much a separate mine from that leased to the colliery company as if it were situated miles away or in a different county. The fact that Lady Warwick has subsequently acquired the coal under the land coloured blue is immaterial. For the present purpose she must be regarded as an entire stranger. In none of the cases cited has there been a physical and actual severance of one part of a seam from another such as exists in the present case. In *Clavering* v. *Clavering* (2) King L.C. speaks of the right to "pursue" a mine in language which makes it abundantly clear that a physical severance would to his mind have made the severed mine distinct and separate. *Campbell* v. *Wardlaw* (1) (where it was pointed out that the law on this subject is the same throughout the United Kingdom) is an authority

(1) (1883) 8 App. Cas. 641. (2) (1726) 2 P. Wms. 388.

that a tenant for life is not entitled to lease mines on an estate because the testator in his lifetime leased other mines. That decision is exactly in point here.

Church, for the trustees of the will of Viscount Maynard.

Onslow, for other parties.

Warrington, Q.C., in reply. On the facts of this case the Court is entitled and ought to presume that the settlor would have continued the working of this coal as being substantially a working of the same mine as that demised to the colliery company.

KEKEWICH J. For the present purpose it will, I think, be sufficient to treat the proposed lease as if it were a lease of the lower main seam only. It is said that, as the Bagworth Coal Company have, as lessees from the settlor, Lord Maynard, worked this lower main seam on a small piece of land to the north of the land coloured blue, there has been an opening of the seam, or of the mine which is to be treated as the seam, on the land which is south of the blue, and which it is now proposed to demise under the authority of the Court. That is the question which I have to consider. That which Mr. Warrington has called the dictum of Lord Selborne, but which I think is more than a dictum, in *Elias* v. *Snowdon Slate Quarries Co.* (1), gives us in a few words the settled law on the subject. Lord Selborne (2) says this: "When a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or a new quarry." It is quite possible to construe that as giving to Mr. Warrington all he wants; but it is obvious that it must not be construed without any limitation. Where a settlor owns an estate in one county, in which estate there is found a seam of coal, and also owns another estate in an adjoining or neighbouring county in which the same seam of coal is found, there, if he works the coal in one estate only, Lord Selborne cannot have meant to say that breaking ground in the other

(1) 4 App. Cas. 454. (2) 4 App. Cas. 466.

KEKEWICH J. 1899 MAYNARD'S SETTLED ESTATE, *In re.*

county would not be the opening of a new mine. I do not think it would be right to wrest his language so as to make it fit such an extreme case. And, moreover, Lord Selborne, after laying down the law thus clearly, adds: "and for this, authority is to be found in the cases, which were cited at the bar"; and then he refers to *Clavering* v. *Clavering* (1), *Bagot* v. *Bagot*, *Legge* v. *Legge* (2), and *Earl Cowley* v. *Wellesley* (3); and I must treat what he says, when he summarizes the law, as being entirely consistent with the cases to which he thus refers. I think it is not difficult to deduce a principle from those cases, and particularly from *Clavering* v. *Clavering* (1) and *Earl Cowley* v. *Wellesley*. (3) The judgment of King L.C. in *Clavering* v. *Clavering* (1) contains a curious expression which seems to me to shew the principle very clearly. His Lordship says, referring to a case tried at the assizes in Devonshire in which he was of counsel: "There it was proved by witnesses to be the course of the country, and a practice well known in those parts among the miners, that any person having a right to dig in mines may pursue the mine, and open new shafts or pits to follow the same vein." The point before the Lord Chancellor's mind, which he brings out there in a very clear manner, is that, by opening the new shafts or pits, you are in reality "pursuing" the same mine. You are pursuing it not by means of pushing forward levels under any particular pit, but by sinking a new pit in order to work the minerals in connection with the shaft under the old pit. That he refers to as pursuing the same vein, notwithstanding it is reached in a different way. That is exactly what is said in reference to a different subject in *Earl Cowley* v. *Wellesley*. (3) I refer to the report in L. R. 1 Eq. because, although it is shorter than that in 35 Beav., it appears to bring out the particular point more clearly. That was a case in which there was waste land and gravel on and under it. It was not like coal reached by sinking a pit, but gotten only by pits on the surface, each pit being separate. That had been done for some time, and the question was whether working a new gravel pit was a continuation of

(1) 2 P. Wms. 388. (2) 32 Beav. 509.
(3) 35 Beav. 635; L. R. 1 Eq. 656, 659.

the old working, and Lord Romilly said (and Lord Selborne, as we have seen, has adopted what he said): "The whole of the gravel or sand on the waste land must be treated as a mine, and each gravel pit as if it were a fresh pit in the mine." That is to say, he treats the waste of the manor and the gravel or sand taken by working successive pits, and each one of the pits worked, nearer one year and further off another year, as one mine. In each case the owner working the gravel is doing what King L.C. called "pursuing" the vein. He does not pursue it inch by inch through the soil, but opens it by attacking the vein from another place; but he is still working the vein which is situate in the waste. I fail to see how it is possible to apply that to this case. The property which it is now proposed to demise, though part of Lord Maynard's estate, is separated from the property demised to the Bagworth Coal Company by the land coloured blue on the plan. It is, as Mr. Lawrence has said, physically and legally separated. There is as much distinction between these two properties as if they were two separate estates in two adjoining counties, or in two counties separated by an intervening county. It is true that the same vein of coal is proposed to be demised, and that that may be deemed the only subject of the demise. But not only is it to be approached from another pit, but it is quite impossible to approach it from the old pit. Lady Warwick has acquired the lower main seam under the blue; but for this purpose she is an entire stranger. She is willing that the two should be worked together, because she happens to be interested in both; but for the present purpose I must treat her as if she had no interest whatever. She comes here as the tenant for life wishing to demise the lower main seam under the land coloured dark pink. That seam must be treated as an entirely different seam from that leased to the Bagworth Coal Company under the land to the north of the intervening blue. It is not like "pursuing" the same vein, as mentioned by King L.C. Of course, I quite follow the evidence that if this were all in one ownership the result would be that, for convenience for commercial purposes, a new pit would be opened; but then it would be one mine. It seems

KEKEWICH J.

1899

MAYNARD'S SETTLED ESTATE, *In re.*

to me that the intervention of the piece of land coloured blue, which belongs to others and is not part of the settled estate, prevents this being an open mine in the sense in which that expression is used by Lord Selborne and in the other cases. It never was in any sense in the same hands in Lord Maynard's time. It could not have been in his contemplation to work the coal under the dark pink by means of a pit under the land to the north of the blue; because he knew, or must be taken to have known, that there was an intervening strip of land which was not his. On the principle of the cases, I think that this is not an open mine, and, therefore, three-fourths of the rent must be set aside and invested.

Solicitors: *Farrer & Co.; Frere, Cholmeley & Co.; G. B. Laurence.*

C. C. M. D.

FREEMAN *v.* LAING.

BYRNE J.

1899

June 8, 16, 28.

[1899 F. 243.]

Mortgage—Further Advance—Second Mortgage—Tacking—Trustees—Joint Tenants.

In October, 1864, certain property was mortgaged to A., B., and C., who were trustees, as joint tenants to secure 3000*l.* and interest.

In February, 1866, the same property was mortgaged to L. to secure 3500*l.* and interest.

In October, 1876, a further charge was executed in favour of the first mortgagees to secure 1500*l.* and interest.

A. died in May, 1883, and B. died in January, 1889. B., who was a solicitor, acted for all parties on the occasions of the creation of all three securities, and had actual notice of the second mortgage and of the further advance when they were created, but he failed to communicate the fact of the second advance to his co-mortgagees, and they had no personal knowledge of its existence at the date of the further advance :—

Held, that the plaintiffs, who were the successors in title as trustees of the first mortgagees, were not entitled to tack the amount due in respect of the further advance to the amount due on the first mortgage so as to postpone the defendants who represented the second mortgagee.

In the case of a mortgage of real estate to joint tenants to secure a debt due to them jointly, it cannot be said as against strangers that any one portion of the security or of the debt belongs to any one of the mortgagees : each is entitled to the whole; and if notice of a second incumbrance is given to any one of them that creates an equity against one in respect of the whole sufficient to prevent any tacking.

By an indenture of mortgage dated October 12, 1864, and made between Thomas Cowan and James Cowan of the one part, and Joseph Oldham, Thomas Walker, and Frederick Barker of the other part, certain hereditaments therein described were demised to Oldham, Walker, and Barker to secure 3000*l.* and interest.

The mortgagees were in fact trustees of a settlement, and the mortgage was to them as joint tenants.

By an indenture dated February 12, 1866, the same premises were, subject to the mortgage of October 12, 1864, assigned by way of mortgage to Samuel Laing to secure 3500*l.* and interest.

By an indenture dated October 9, 1876, the same premises were charged in favour of the first mortgagees with the further sum of 1500*l.* and interest.

BYRNE J.
1899
FREEMAN
v.
LAING.

Joseph Oldham died in May, 1883, and thereupon the first mortgage and further charge of October 9, 1876, and the debts thereby secured, became vested in Thomas Walker and Frederick Barker as joint tenants.

Thomas Walker died in January, 1889, leaving Frederick Barker the sole surviving joint tenant.

The plaintiffs were the present joint mortgagees claiming as new trustees duly appointed of the settlement of which Oldham, Walker, and Barker were the trustees, and by virtue of assignment from Barker to them as such new trustees. The defendants were the present owners of the second mortgage of February 12, 1866, claiming as trustees of a post-nuptual settlement created by Samuel Laing and dated February 23, 1866, to whom the mortgage of February 12, 1866, had been assigned, the said Thomas Walker being one of such trustees.

Thomas Walker was a solicitor, and acted for all parties on the occasions of the creation of the first and second mortgages and of the further advance by the first mortgagees.

Thomas Walker had actual notice of the second mortgage at the date of its creation and at the date of the further advance, but he failed to communicate the fact of the second advance to his co-mortgagees, and they had no personal knowledge of its existence at the date of the further advance.

The plaintiffs claimed a declaration that they were entitled to tack the further charge to their mortgage dated October 12, 1864, and to rank in priority to the charge dated February 12, 1866.

The defendants, under the indenture of February 12, 1866, claimed priority over the indenture of further charge dated October 9, 1876.

Neville, Q.C., and *H. J. Turrell*, for the plaintiffs. It will be said that the plaintiffs and their predecessors, the holders of the first mortgage and deed of further charge, were trustees, and that notice to one of several trustees is notice to all: *Ward* v. *Duncombe*. (1) But that applies only to successive assignees of trust funds held by trustees. There might in the circum-

(1) [1893] A. C. 369.

stances of the case be a personal disqualification if Walker were now alive and a co-plaintiff seeking to tack against the second mortgage to himself and others; but personal disqualification of one mortgagee (who may be made if living a co-defendant) is not an answer to an action by his co-mortgagees: *Luke* v. *South Kensington Hotel Co.* (1); *Smith's Case.* (2) If constructive notice through Walker is suggested, then we rely on the Conveyancing Act, 1882, s. 3, sub-s. 1, cl. 2, and on *In re Cousins.* (3)

Levett, Q.C., and *Medd*, for the defendants. The plaintiffs hold (and their predecessors held) the first mortgage and the deed of further charge as joint tenants. The estate and interest of each joint tenant is in the whole subject-matter: the facts as to Walker, therefore, exclude all right of tacking in his joint tenants. *Smith's Case* (2) proceeded on the ground of the separate beneficial interests of those two of the three mortgagees who were not directors of the borrowing company, and were under no duty to have the mortgage registered in the company's register. Here the mortgagees were trustees. *Luke* v. *South Kensington Hotel Co.* (1) merely decided that, as two of three trustees could not validly release rights of the three as mortgagees, the trustee mortgagee who had done no act to release could sue the defendant company, the mortgagors, and could make his co-mortgagees co-defendants.

The circumstances as to Walker are not matters of constructive but of actual notice. He was not only solicitor to all parties in all three transactions, but the second mortgage became vested in him and others before the execution of the deed of further charge to himself and others. There is no evidence of any inquiry by the first mortgagees on the occasion of the further advance as to how the title then stood.

[They referred to *Rolland* v. *Hart* (4) and *Bradley* v. *Riches.* (5)]

Neville, Q.C., in reply.

Cur. adv. vult.

(1) (1879) 11 Ch. D. 121.
(2) (1879) 11 Ch. D. 579.
(3) (1886) 31 Ch. D. 671.
(4) (1871) L. R. 6 Ch. 678.
(5) (1878) 9 Ch. D. 189.

BYRNE J.
1899
FREEMAN
v.
LAING.

June 28. BYRNE J., after stating the facts, proceeded:—All the foregoing facts are admitted, and the question for consideration is whether or not the plaintiffs are entitled to tack the amount due in respect of the further advance to the amount due on the first mortgage, and so to postpone the second mortgagees.

I am of opinion that they are not. No question arises in this case as to the effect of purchase for value without notice, and the matter has to be determined as though it were a claim on the part of Barker, the survivor of the original mortgagees in joint tenancy.

Had Walker been the survivor, it would have been impossible for him to have asserted the right to tack; but it is said that the equity arising against a first mortgagee who seeks to tack by reason of his having notice of a second mortgage at the time when he makes a further advance is a purely personal equity against the individual, and cannot affect others though interested jointly with him in the mortgage debt and the security.

The question is, of course, quite different from that arising when there is a contest between assignees of a fund of personal estate vested in trustees as to priority. In that case it is established that, if one only of the trustees in existence at the date of the second assignment had notice of the prior assignment, the earlier assignee does not lose his priority. It has also been held that an assignee who has given notice to one only of several trustees is not entitled to priority over a subsequent assignee who takes his assignment after the death of the trustee to whom notice was given; and it has also recently been determined by Stirling J. in *In re Wasdale* (1), where the authorities for the former propositions are referred to, that an assignee who has given notice to all the trustees in existence at the time of his assignment is entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all those trustees, and who gives notice of such assignment to the new trustees.

In the case of a mortgage of real estate to joint tenants to

(1) [1899] 1 Ch. 163.

secure a debt due to them jointly, it cannot be said as against strangers that any one portion of the security or of the debt belongs to any one of the mortgagees: each is entitled to the whole; and if notice of a second incumbrance be given to any one of them, that appears to me, by creating an equity against one in respect of the whole, to prevent any tacking, which in such a case must be of the further advance to the whole subsisting original debt.

If the joint tenant to whom notice is given dies, the security and debt become vested in the survivors by operation of law; but I cannot see how that confers upon them any better equity than they had before, or renders the pre-existing equity of the second mortgagee any worse. If it be correct to say that the right of the three joint tenants to tack all that is due in respect of further advances (which is a right to retain the legal estate until satisfied) was lost by reason of the notice given to one of them, it is difficult to see how that right can revive.

I think there is a certain analogy between this state of things and the case of a devise to two as joint tenants, one being privy to an illegal intent on the part of a testator, and the other not, in which case neither can claim under the devise, the result being different in the case of a devise to two as tenants in common, in which case he who is not privy to the intent will take, the other not: see *Jones* v. *Badley* (1) and *Rowbotham* v. *Dunnett*. (2) The case of *In re South Durham Iron Co., Smith's Case* (3), relied upon by the plaintiffs, is distinguishable on the ground, amongst others, that there was no question there as to the effect of the neglect of one of several joint tenants, but of the neglect of one of several persons having separate interests to do something which he ought to have done in a different capacity.

It is unnecessary to express my opinion upon the other point argued, namely, whether or not notice ought to be imputed to Walker's co-mortgagees by reason of his having acted as solicitor for them on the occasion of the further advance. There are some observations by the present Master of the Rolls in *Bailey*

(1) (1868) L. R. 3 Ch. 362. (2) (1878) 8 Ch. D 430.
(3) 11 Ch. D. 579.

BYRNE J. 1899 FREEMAN v. LAING.

v. *Barnes* (1) which would have to be borne in mind before determining this question hostilely to the defendants. They have a bearing on the argument put forward by Mr. Levett as to the duty of a party to inquire.

Solicitors: *Walter O. Freeman; Maples, Teesdale & Co.*

G. M.

BYRNE J. 1899 *June* 28, 29.

MOSTYN *v.* ATHERTON.

[1898 M. 1160.]

Spring—Flowing Water—Defined Channel—Artificial Channel—Alteration of Natural Flow—Riparian Owner—Injunction—Public Well—Urban District Council—Licence to take Water—Public Health Act, 1875 (38 & 39 *Vict. c.* 55).

In an action by a riparian owner and his tenant, the occupier of a mill on the banks of a stream, against a licensee from an urban district council, who were in possession of the land upon which the spring rose, to restrain the defendant from taking water from the spring and from interfering with the accustomed flow of water in the said stream, the defendant contended that he was entitled to abstract the water before it had risen to the surface, or flowed in a defined channel:—

Held, following *Dudden* v. *Clutton Union*, (1857) 1 H. & N. 627, that the defendant was not entitled to diminish or interfere with the natural flow of the water at its source, and that the principle of that decision was not affected by the fact that at some remote period the source of the spring had been built round, and formed into a polygonal well in order to improve its mode of issuing from the earth, thus making an artificial channel for a short distance.

A local authority has no power under the Public Health Act, 1875, to license a stranger to take water from a public well for commercial purposes.

ACTION.

The plaintiff, Sir Pyers William Mostyn, Bart., was the owner in fee of land, situate at Holywell, in the county of Flint, on each side of a stream called the Holywell Stream, and also of several mills and works abutting on the said stream; the plaintiffs, Grosvenor Chater & Co., Limited, were the lessees and occupiers of one of the said mills called the Abbey Paper Mills. The plaintiffs brought the present action against the

(1) [1894] 1 Ch. 25, 35.

defendant, a licensee from the urban district council of Holywell, to restrain him, his servants, &c., from diverting or abstracting any water from the spring known as St. Winifred's Well and from the Holywell Stream, and from in any way interrupting or interfering with the accustomed flow of water in the said stream through the lands of which the plaintiffs were respectively owners and occupiers.

According to the plaintiffs, the source of the said stream was an underground watercourse flowing in a defined channel, which rose to the surface of the ground through holes in the rock into a stone basin called the Octagonal Well, whence it flowed into another basin called the Lady's Well, and thence into a swimming-bath, and then for about a mile down the valley into the estuary of the river Dee. The Octagonal Well and Lady's Well, which were surrounded by a low stone wall with pillars supporting the roof above the well, were collectively known as St. Winifred's Well. The well was a famous well, and had for many centuries been and still was visited by large numbers of pilgrims who drank the water and bathed in the well; the water was believed to possess curative and medicinal properties.

The plaintiffs and their predecessors had for more than a hundred years enjoyed the free and uninterrupted flow of water from the well down the stream, and had used the water for motive power and for other reasonable purposes in the mills.

By an indenture of March, 1898, the urban district council of Holywell, who were in possession of the land from which the water issued, purported to grant to the defendant, in consideration of a rent of 500*l.* a year to begin with, the sole and exclusive right to abstract and use water from St. Winifred's Well for the purpose of storing, making up in casks, jars, bottles, and other receptacles, and treating, preparing, and selling the same, with the right to use existing pipes tapping the well which had been inserted by the promoters of a waterworks company formerly projected, but now abandoned; the defendant was also empowered to take water between the hours of midnight on Saturday and midnight on Sunday in each week, and, in the discretion of the council, between the

BYRNE J. 1899 MOSTYN v. ATHERTON.

hours of 6 P.M. on every evening and 6 A.M. on the following morning.

The well at one time used to give over twenty tons of water a minute, but for the last twenty years and more it had been steadily decreasing in volume owing to drainage and mining operations in the neighbouring mountain, and was now barely sufficient for the needs of the plaintiffs and other owners and occupiers of mills and works on the banks of the said stream. It was alleged that if the defendant exercised the powers given him by the said indenture the accustomed flow of the water would be materially interfered with, and that some loss and damage would be done to the plaintiffs.

The defendant contended that the source of the water which came to the surface in this stone-surrounded well was unknown, and that the water did not flow in any defined channel, and he also contended that he was entitled, under the said indenture or licence from the urban district council, to abstract water from the land of the council before it had risen to the surface and become a stream, or flowed in a defined channel. The action was tried with witnesses, and the plaintiffs put in evidence to shew that what the defendant proposed to do would cause a sensible diminution in the flow of the water; and that from the nature of the soil and conformation of the surrounding rock and strata the water probably flowed in a known and defined subterranean channel before it issued into the well: the defendant put in no evidence on this point, but proved numerous acts of ownership by the district board and their predecessors exercised over the well and the land whence the water issued. The result of the evidence, so far as material for the purposes of the decision of the case, is sufficiently stated in the judgment.

Neville, *Q.C.*, and *W. H. Cozens-Hardy*, for the plaintiffs. Assuming that the urban district council are riparian owners, they cannot confer on the defendant, who is not a riparian owner, any right to take this water, if by so doing he sensibly diminishes the flow of water by the lands of other riparian proprietors: *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1)

(1) (1883) 11 Q. B. D. 155.

[BYRNE J. The defendant in his defence pleads that what he proposes to do will not materially interfere with the plaintiffs—in which case you could not get an injunction: *Kensit* v. *Great Eastern Ry. Co.* (1)]

The evidence will shew a very serious diminution of water. The defendant will rely on *Chasemore* v. *Richards* (2), but to obtain the benefit of that decision he must shew that he can abstract the water before it comes to the surface of the ground, or flows in a defined channel. The defendant cannot divert the water at the spring-head: *Dudden* v. *Clutton Union.* (3) This case has been followed in *Bunting* v. *Hicks* (4); if *Chasemore* v. *Richards* (2) is to apply at all, the defendant must shew that the water before it comes to the surface has not been flowing in a known and defined channel; and the plaintiffs must, to obtain relief, shew the contrary; the question to be determined in such a case is whether the water appearing at a given point and then becoming a surface stream comes from subterraneous percolation, or flows in a defined channel underground to the point where it so appears; and for the decision of that question, the onus is on the party asserting his right to the flow to shew affirmatively, not as a visible fact, but as a reasonable inference from known facts, that the water comes to the place of emergence, not by percolation or oozing, but in a known and defined channel: and this our evidence does prove. "Defined" means a contracted or bounded channel, although the course of the stream may be undefined by human knowledge. "Known" means reasonable inference from existing and observed facts in the natural condition of the ground, and is not synonymous with "visible," nor is it restricted to knowledge derived from exposure of the channel from excavation: *Black* v. *Ballymena Township Commissioners.* (5)

Further, we say the district council are not the owners of the soil of the well. The real ownership of the well is not known; but it is certainly a public well.

(1) (1883) 23 Ch. D. 566; (1884) 27 Ch. D. 122.
(2) (1859) 7 H. L. C. 349.
(3) 1 H. & N. 627.
(4) (1894) 70 L. T. 455.
(5) (1886) 17 L. R. Ir. 459.

BYRNE J.
1899
MOSTYN
v.
ATHERTON.

[BYRNE J. referred to Camden's Britannia by Gough, pp. 588 and 593, which contained a description of the well. Pennant's History of Whiteford and Holywell, p. 219, was also referred to.]

All the alleged acts of ownership exercised by the council or their predecessors can be attributed to the statutory powers conferred by the Public Health Act, 1848, *Smith* v. *Archibald* (1), and the Public Health Act, 1875. This statutory vesting of the well in the local authority would not vest the sub-soil: *Tunbridge Wells Corporation* v. *Baird* (2); and the district council cannot license the defendant to take away water for his own purposes; the doctrine of *Chasemore* v. *Richards* (3) does not apply to a limited statutory ownership of this kind. On either of the above grounds the plaintiffs are entitled to the relief sought.

J. Rutherford, for the defendant. First, I say that the district council are owners in fee of the soil of the well, and as such can take the water from the well or license any one else to do so before it comes to the surface, as the defendant proposes to do by means of the pipes let in below the stone wall of the well. The rights of riparian owners do not apply to a well, but only to a stream, and there is no stream here till after the water passes out of the Lady's Well. The district council have a title by occupancy and the exercise of proprietary rights over the well; but even assuming they are trespassers, they can take the water from the well as against any one but the true owner. The true owner might stop the defendant taking the water under his licence, but not the riparian owners. *Chasemore* v. *Richards* (3) prevents the riparian owners from coming to prevent any dealing with underground water at the source of the spring; the evidence as to the supposed defined channel is purely conjectural, the channel is not "known," and *Chasemore* v. *Richards* (3) applies: *Ewart* v. *Belfast Poor Law Guardians*. (4) *Dudden* v. *Clutton Union* (5) does not apply to this case, where the

(1) (1880) 5 App. Cas. 489.
(2) [1896] A. C. 434.
(3) 7 H. L. C. 349.
(4) (1881) 9 L. R. Ir. 172.
(5) 1 H. & N. 627.

well is completely surrounded by a stone wall and is roofed over; it is a well of artificial construction with an artificial channel, and there is no natural or defined channel till it gets outside the Lady's Well. For thirty years the district council and their predecessors have exercised acts of ownership over this well, and done what they thought right with the water, and they are within their rights in granting this licence to the defendant. These acts of ownership were not done under the statutory powers of the Public Health Acts. This was not a public well which vested in the local authority under these statutes.

Neville, Q.C., in reply. The district council are not in the same position as an owner in fee; but even an owner in fee cannot, according to *Dudden* v. *Clutton Union* (1), divert the flow of water at its source; that case was recognised as a binding authority in *Bunting* v. *Hicks* (2), and the principle of the decision is not affected by the fact that centuries ago the issuing point of the spring has been built over and an artificial well and channel formed for the more convenient use of this spring.

BYRNE J., after stating the relief sought by the plaintiffs, continued:—There is at Holywell, in Flint, the source of an ancient stream, which has existed and flowed down into the estuary of the Dee for hundreds of years. That source takes its origin in certain holes in the rock, whence the water wells up from the rock, as it has done for hundreds of years, in great volume, though not now in such enormous quantities as it formerly did. Two hundred years ago or more, as appears from Camden's Britannia, the water issued at such a rate that a mill was driven by it within a very short distance of its source. A great many years ago, as is stated by Camden and Pennant, an ecclesiastical sort of building of the nature of a covering to the well was erected by the mother of Henry VII. At all events, there is a very ancient building erected over this spot for the protection of the shrine of St. Winifred, and as a part

(1) 1 H. & N. 627. (2) 70 L. T. 455.

BYRNE J.
1899
MOSTYN
v.
ATHERTON.

of that building there is in the middle what is known as St. Winifred's Well—that is, a polygonal stone structure built up a few feet round the spring and above the level of the surrounding floor, which enables the water to be temporarily caught before it issues forth. It travels through the Lady's Well, and then through a place which is now used as a bath, and then goes down to the sea as it has done for hundreds of years, and is made use of, amongst others, by the plaintiffs, Messrs. Chater & Co., Limited, who are tenants of Sir Pyers Mostyn. There can be no doubt whatever that there has been a flow of a natural stream down from St. Winifred's Well to the sea for centuries, and there is no doubt, apart from the particular question raised in this action, that the millowners on the stream, in fact all the riparian owners, have had the benefit of this natural flow, subject to the legal right of those above them to abstract for proper purposes the water from the stream as it flows past their land. The defendant claims title under the urban district council. He claims under a licence granted by the district council, whereby the council, "so far as they have power to do so, and without prejudice to the commonable rights, if any, of the inhabitants of Holywell, grant to the defendant the exclusive right to abstract the water" for the purposes of bottling and selling it. I need not travel through the licence. A rent is reserved, and it contains certain provisions as to the water to be taken, the result of which is that, in consideration of a rent, the district council have purported to give a licence to the defendant to take such a quantity of water from the spring as will, according to the evidence, have the effect of sensibly diminishing the flow of water past the works of the riparian proprietors on the banks of the stream. The defendant justifies this proceeding, claiming the right to do so under the district council, and he says, as they had a right to do this, so he now has a right to abstract the water in this way. The spring issues from the rock, and the right purporting to be conferred upon the defendant is to take the water from the spring. Were it not for this stonework round the top of the visible source of the

spring, there could be no question at all but that this case comes within the authority of *Dudden* v. *Clutton Union*. (1) In that case there was water coming from a spring to a stream where there was a mill. The spring was cut off at its source and the water received into a tank as it rose from the earth by the licence of the owner of the soil on which the spring rose. There it was held that an action lay by the mill-owner against the person so abstracting the water, and the learned judges in the case pointed out that there was a natural spring the water of which had acquired a natural channel from its source to the river, and they held the defendants were not entitled to put in a tank, by the licence of the owner of the soil, and so take the water at the spring-head and prevent it going down, although it had not then entered what might be called the channel from the top of the spring. That case is a binding authority, and has been recently recognised as good law in *Bunting* v. *Hicks*. (2) But it is said in the present case that the district council have power to do what they have done because they are in the position of persons who have acquired title by virtue of the Statute of Limitations, this well not having been a well which vested in them under the Public Health Acts, and they say they have exercised these acts of ownership since the establishment of a local board, which was some time in 1862. Up to a certain period before the district council's predecessors were in existence, the well appears to have been for some time under the management of a voluntary committee of ratepayers of the parish, by which I mean the parochial division of Holywell. They had managed it and got up some subscriptions, and put a caretaker there to look after it. At that time the well was freely accessible from the road by steps direct down into this ecclesiastical building which surrounded it. The local board, by means of agreements for leases from neighbouring owners, acquired land round the well; but they never acquired the site of the well by virtue of any lease or agreement for a lease, or of any tenancy. They never did acquire the actual site of the chapel itself or of the land underneath where the spring issues; but they have exercised certain

(1) 1 H. & N. 627. (2) 70 L. T. 455.

BYRNE J. 1899 MOSTYN v. ATHERTON.

rights, or they have done certain acts in respect of this well, from which Mr. Rutherford, who has argued this case with the greatest care and ability, asks me to infer that they were claiming title as trespassers, as I understood him. If this well were a public well, the local board acquired such rights as they have in it under the Act of 1875 as being a public well. They had not previously, or by virtue of what their predecessors had done or they had themselves done, acquired any sort of statutory title as trespassers or as simply excluding other people. In my opinion the whole of the evidence, so far as it goes, points to this having been a public well; and I think the true conclusion to come to is that this was a public well within the meaning of the Public Health Act, 1875. I think that such acts as were done by the local board in reference to the control and management of the well may be fairly referred to the view that they were entitled under the provisions of the Public Health Act of 1848 to take charge of and to look after public wells for the gratuitous supply of public baths, and also because all public wells and works used for the gratuitous supply of water to the inhabitants have to be continued, maintained, and plentifully supplied with water. If they have in some degree exceeded those powers, I do not think that such excess in the exercise of their powers has been shewn as to lead me to the conclusion that they were acting in pursuance of a title originating in illegality rather than of a title originating in legality, and I think that since 1875, again, the acts they have done have been intended by them to be done in pursuance of the powers conferred upon them by the Public Health Act, 1875. So that, so far as the evidence before me is concerned, everything points to this having been a public well, and being vested as a public well, and as a public well only, in the local board or district council. It is conceded—at least I think it is conceded—if not, I am of opinion that the provisions of the Public Health Act, 1875, would not justify the local board, or persons claiming under licence from them, in doing what is proposed to be done under the licence in question. I think, therefore, that there is no right on the part of the defendant under this licence to abstract and use water from the spring in

the manner and for the purposes mentioned in the licence. It has been proved before me that this licence will, if it is acted upon, especially if acted upon in any considerable degree, cause a sensible diminution in the flow of the water; and I think, therefore, that the plaintiffs have established their right to the injunction as asked.

I ought to make some further observations with reference to the question whether the principle of *Dudden* v. *Clutton Union* (1) applies to the present case. It has been put to me that there was here an artificial erection making, in fact, the well as distinguished from the spring, and that therefore that was not a natural watercourse direct from the spring down past the lands of these riparian proprietors to the sea, because it first passes through this artificial construction or well. I do not think that that argument is well founded or sufficient to distinguish this case from *Dudden* v. *Clutton Union*. (1) This is a spring which issues, as I have said, direct as a spring from the rock. I think the true view to take is that the spring existed, and existed as a spring coming direct from the land and running in a natural course, and the fact that at some remote date some one has built round and over the issuing point, the source of the spring, in order to improve its method of issuing from the earth, will not be sufficient to distinguish this from the case above cited, which holds that you must not at the source of the spring destroy the natural flow from the spring all down the natural course of the stream. The utmost that could be said would be this—that at some remote date an artificial course has been made for a small distance from the issuing point of the spring. In my opinion that is not sufficient to justify the acts complained of, or to destroy the rights which have been acquired by the riparian owners. I therefore grant the injunction, with costs.

Solicitors: *Slaughter & Colegrave; Wynne, Holme & Wynne, for F. J. Leslie & Co., Liverpool.*

(1) 1 H. & N. 627.

W. C. D.

BYRNE J. 1899 July 20, 21, 22.

TRANSVAAL EXPLORING COMPANY, LIMITED *v.* ALBION (TRANSVAAL) GOLD MINES, LIMITED.

[1898 T. 335.]

Company—Reconstruction—Shares partly paid up—Registration of Contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

By an agreement of March, 1897, under which the defendant company had been reconstructed, it was provided that, as part of the consideration for the transfer of the assets of the old company to the defendant company, the liquidator of the old company should be entitled to have allotted to him or his nominees 200,000 shares of 10*s.* each in the defendant company, with 7*s.* 6*d.* per share credited thereon as paid up, upon applying for the same within two months from the date of this agreement, and making a small further payment with such application. This agreement was filed with the Registrar of Joint Stock Companies; the plaintiff company having applied for 6500 of these 200,000 shares under the option so conferred upon them, the question was raised whether the filing of the above agreement was a sufficient compliance with s. 25 of the Companies Act, 1867:—

Held, following *Elsner and McArthur's Case*, [1895] 2 Ch. 759, that the filing of the reconstruction agreement of March, 1897, was a sufficient compliance with s. 25 of the Companies Act, 1867.

In re Coolgardie Consolidated Gold Mines, (1898) 14 Times L. R. 277, and *In re Jackson & Co.*, [1899] 1 Ch. 348, distinguished.

ACTION.

The plaintiff company by their statement of claim asked for the rectification of the register of members of the defendant company, repayment by the defendant company of money paid for calls, an injunction to restrain the defendant company from enforcing payment of calls, and damages; but at the trial the only question argued was whether an agreement of March, 1897, which had been filed with the Registrar of Joint Stock Companies at or before the issue of certain shares, sufficiently complied with s. 25 of the Companies Act, 1867. The facts, so far as material, were as follows:—

In January, 1897, the plaintiff company was the holder of 6500 fully paid-up shares of 10*s.* each in the Albion (Transvaal) Gold Mines, Limited, hereinafter referred to as "the old company,"

which had been incorporated in May, 1895, with a nominal capital of 125,000*l.* divided into 250,000 shares of 10*s.* each, of which 200,000 had been issued.

In February, 1897, it was resolved to reconstruct the old company, and transfer its assets and business to a new company; and accordingly the defendant company was duly incorporated on February 27, 1897, with a nominal capital of 125,000*l.* divided into 250,000 shares of 10*s.* each.

By an agreement dated March 2, 1897, and made between the old company and its liquidator of the one part, and the defendant company of the other part, it was agreed that the old company and its liquidator should transfer, and the defendant company should take over, all the lands, buildings, mining claims, concessions, water rights, and other easements, machinery, plant, ore, goods and chattels of the old company, and all shares belonging to the old company, and the undertaking, business, and goodwill thereof, subject to, but with the benefit of, all contracts and agreements entered into by the old company.

Clause 6 of this agreement provided that, as part of the consideration for the said transfer, the liquidator of the old company should be entitled to have allotted to him or his nominees 200,000 shares of 10*s.* each in the defendant company, with the sum of 7*s.* 6*d.* per share credited thereon as paid up, to the intent that as many as might be required of such shares might be distributed among the members of the old company or their assigns, in manner following: that was to say, holders of fully paid shares in the old company should be entitled to have one share of 10*s.* (credited with 7*s.* 6*d.* paid up) of the defendant company for every fully paid share in the old company. Provided that the defendant company should not be bound to allot to the liquidator, or to any such nominee, unless the liquidator within two months from the date thereof, or such nominee within seven days after the giving by the liquidator of the notice thereinafter referred to, as the case might be, claimed, by writing addressed to the defendant company on the prescribed form, his allotment, and paid up therewith 6*d.* per share, and agreed at the same time, on the

BYRNE J.
1899
TRANSVAAL EXPLORING COMPANY, LIMITED v. ALBION (TRANSVAAL) GOLD MINES, LIMITED.

prescribed form, to pay up the unpaid balance of 2*s.* per share on the shares he was entitled to, as might be required by the defendant company, in calls not exceeding 6*d.* per share, at intervals of not less than two months; and it was provided that the liquidator should forthwith give to each member of the old company notice of the provisions of the said clause; but if any members of the old company failed or omitted to claim, in manner aforesaid, his allotment of shares in the defendant company within seven days from the giving by the liquidator of the said notice, then such member's right to such allotment should absolutely cease; and as regards all shares of the defendant company which the shareholders of the old company, being entitled thereto, failed or omitted to claim within the period and on the terms aforesaid (thereinafter called unclaimed shares), the liquidator should use his best endeavours to sell the same, and should deal with the net proceeds arising from such sale as therein mentioned; and when any such sale was made, the defendant company should, on the nomination of the liquidator of the old company, allot to the purchaser or purchasers the shares sold, credited as paid up to the extent aforesaid, on such purchaser or purchasers applying for such shares in the manner and on the terms as to payment or otherwise thereinbefore prescribed in the case of the liquidator or his nominees applying for shares forming part of the said 200,000 shares.

On March 26, 1897, the plaintiff company, in response to a notice received from the liquidator of the old company, applied to the defendant company on the prescribed form for 6500 shares of 10*s.* each, with 7*s.* 6*d.* credited as paid up thereon, and at the same time paid to the defendant company the sum of 6*d.* per share in respect of the said 6500 shares, amounting to the sum of 162*l.* 10*s.* The defendant company in due course allotted to the plaintiff company 6500 shares, which purported to be issued with 7*s.* 6*d.* per share credited as paid up thereon.

The said agreement of March 2, 1897, had been filed with the Registrar of Joint Stock Companies prior to the issue of the 6500 shares, and the only question for the decision of the

Court was whether this was a proper and sufficient contract within s. 25 of the Companies Act, 1867.

Farwell, Q.C., and *Manning*, for the plaintiff company. The agreement which has been filed is not the contract under which these 6500 shares were issued: there was not in fact any contract to issue these shares until the option reserved by the agreement was exercised by an application for shares in the manner prescribed by the agreement. It is not an agreement to issue a specified number of partly paid-up shares in any event. It is, therefore, not a "sufficient contract in writing" within the meaning of s. 25 of the Companies Act, 1867, according to *In re Kharaskhoma Exploring and Prospecting Syndicate.* (1) Unless the filed contract shews the number of shares to be issued under it, the object of the section, the protection of the public, is defeated: Palmer's Company Precedents, 7th ed. Pt. I. p. 181. This is merely a contract giving an option, and therefore insufficient: *In re Coolgardie Consolidated Gold Mines* (2); *In re Jackson & Co.* (3) A mere offer to allot shares is not enough: *In re New Eberhardt Co.* (4) The decision in *Elsner and McArthur's Case* (5) is inconsistent with *In re Coolgardie Consolidated Gold Mines* (2) and *In re Jackson & Co.* (3), on this point, which, as a fact, was not fully argued; the main question in *Elsner and McArthur's Case* (5) being as to the making of the contract directly between the company and the allottee of the shares. Having to choose between two conflicting decisions, the Court must consider the object and principle of s. 25; and we contend that the contract of March 2, 1897, does not sufficiently comply with that section.

Rowden, Q.C., and *Hamilton*, for the defendant company. The contract is a proper and sufficient compliance with the requirements of s. 25. The Court has not to consider a contract "for the issue of shares," but a contract determining "the mode of payment" otherwise than in cash. All shares

(1) [1897] 2 Ch. 451, 468.
(2) 14 Times L. R. 277.
(3) [1899] 1 Ch. 348.
(4) (1889) 43 Ch. D. 118.
(5) [1895] 2 Ch. 759.

BYRNE J.
1899
TRANSVAAL EXPLORING COMPANY, LIMITED
v.
ALBION (TRANSVAAL) GOLD MINES, LIMITED.

are to be deemed to have been issued subject to the payment of the whole amount in cash, "unless the same," that is, "the terms of payment," is otherwise determined by a contract duly filed: *In re Almada and Tirito Co.* (1); *Ooregum Gold Mining Co. of India* v. *Roper.* (2)

We rely on *Elsner and McArthur's Case* (3), which is exactly in point; the decision there rested on the ground that the contract constituted not an offer by the new company to allot, but an obligation binding them to allot if the option was exercised, and that is what the contract does in this case. *In re New Eberhardt Co.* (4) does not apply, or conflict with *Elsner and McArthur's Case.* (3) The only agreement which has to be regarded under s. 25 is the agreement which provides that the shares shall be paid for otherwise than in cash. One document may contain two agreements: (*a*) a contract to take shares; (*b*) a contract to pay for them otherwise than in cash. But these agreements may be separate, as in *Elsner and McArthur's Case* (3), where (*b*) was registered, and (*a*) was not registered. In *In re Jackson & Co.* (5) it was the purchaser who was to have the option. The decision in *In re Coolgardie Consolidated Gold Mines* (6) is quite right, but is distinguishable from the present case, because in that case there was no contract which provided that shares should be paid for in kind until the option was exercised. These cases when looked into do not conflict with *Elsner and McArthur's Case.* (3)

Farwell, Q.C., in reply. Sect. 25 was intended to protect creditors; therefore a contract filed under that section should clearly define the shares that are to be paid for otherwise than in cash; the present contract does not give the full information required by the section. *Elsner and McArthur's Case* (3) is inconsistent with the later decisions, and even with the cases Romer J. himself relied on. [He also referred to *Carling's Case* (7) and *In re Waitekauri Gold Mining Co.* (8)]

(1) (1888) 38 Ch. D. 415.
(2) [1892] A. C. 125, 142.
(3) [1895] 2 Ch. 759.
(4) 43 Ch. D. 118.
(5) [1899] 1 Ch. 348.
(6) 14 Times L. R. 277.
(7) (1875) 1 Ch. D. 115.
(8) *The Times*, August 11, 1897.

BYRNE J., after reading clause 6 of the agreement, continued:—The point raised in the present case is this. The agreement was duly registered, but it is said that inasmuch as there was not an agreement to issue a specified number of shares in any event, it does not amount to such an agreement as ought to be valid under s. 25 of the Companies Act, 1867—that, in point of fact, it was nothing more than a contract for an option, and that until the option should be exercised there was no contract capable of being registered, so as to come within the meaning of s. 25. The point in question has undoubtedly been the subject of decision in *Elsner and McArthur's Case*. (1) Romer J. there had a case before him which, in my opinion, governs this case so far as the decision is concerned; but it is suggested that the particular point was not fully argued, and that the decision is inconsistent with two other cases to which I have been referred. I do not want to go at any length into the circumstances of *Elsner and McArthur's Case* (1), but Romer J. says (2): "By the agreement this company were bound to allot to each shareholder of Spiel's company his proportion of shares if he applied for them; and the fact that each shareholder had an option and was not bound to apply did not the less render the agreement a contract and one binding on this company. This company had no option in the matter, and, moreover, notwithstanding the curious wording of the agreement, and the form of the assignment made in pursuance of it, dated March 30, 1892, I think the option given formed part of the consideration for the sale of the property, the subject of the agreement." Now I go back to s. 25 of the Act of 1867, which provides: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same"—there is no dispute now, after the decisions we have had under this section, that the words "the same" may be read as "the terms of payment," and, therefore, I will read it in that way—"unless the terms of payment shall have been otherwise determined by a contract duly made in writing and filed." The section does not say that the contract referred

(1) [1895] 2 Ch. 759. (2) [1895] 2 Ch. 764.

BYRNE J.
1899
TRANSVAAL EXPLORING COMPANY, LIMITED v. ALBION (TRANSVAAL) GOLD MINES, LIMITED.

to must be a contract for the issue of the shares. No question can arise under s. 25 whether a share is fully paid up or not until after issue; but it appears to me that the terms of the section permit of a contract, not being a contract for the issue of the shares, being one determining that the whole amount of shares to be issued shall be taken to be paid for otherwise than in cash. If that be the true reading of the section, it seems to be perfectly consistent with the decision in *Elsner and McArthur's Case* (1), and I propose to follow that decision.

The case has been so fully and so well argued before me that I feel bound to go a little more into the case than I should otherwise have done; I should probably have contented myself with saying that I think, under the circumstances, I ought to follow the decision in *Elsner and McArthur's Case* (1), inasmuch as the other cases to which I have been referred do not purport, and were not intended, to be differing judgments from that of Romer J. in *Elsner and McArthur's Case* (1), and, moreover, they differ in the circumstances, and, as I think, in the principles to be applied. In the case that I have before me the company is bound to issue these shares, if at all, as paid up to the extent of 7*s.* 6*d.*; that is to say, the contract, if acted upon, binds the company to issue partly paid-up shares, and not to confer a power upon, or reserve a power to, the company to pay otherwise than by means of partly paid-up shares. On the other hand, I have been referred to the case of *In re Coolgardie Consolidated Gold Mines* (2), before Wright J. There the contract provided that the directors of the purchasing company might discharge their obligations either wholly in cash, or partly in cash and partly in fully paid-up shares, or wholly in fully paid-up shares; so that it appears that there was no final determination that the shares to be given as the purchase-price were to be issued otherwise than for cash. So also in the case before Kekewich J. of *In re Jackson & Co.* (3), the determination was left to the directors whether they should pay wholly or partly in cash, shares, or debentures. I think that there is a clear distinction

(1) [1895] 2 Ch. 759. (2) 14 Times L. R. 277.
(3) [1899] 1 Ch. 348.

between these two cases and *Elsner and McArthur's Case* (1), which I propose to follow; and I see no reason to differ from the reasons which Romer J. gave for that decision.

There is one other thing I ought to mention, as it was strongly urged upon me—that is with regard to the true object of the 25th section. Undoubtedly the object of that section was permissive, and what I have to see is whether the terms have been complied with. I may point out that the present contract does give information which is not given by the registration of the contracts in the cases before Wright J. and Kekewich J., although not all the information which some persons might desire. I will therefore make the declaration asked for, namely, that the contract of March 2, 1897, was a sufficient contract within s. 25 of the Companies Act, 1867, and all further proceedings in the action will be stayed, as arranged.

Solicitors: *Wetherfield, Son & Baines; Lindsay, Greenfield & Masons.*

(1) [1895] 2 Ch. 759.

W. C. D.

COZENS-HARDY J.

1899

May 5, 6, 8, 9, 10, 19.

BROWN *v.* MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF DUNSTABLE.

[1898 B. 253.]

Sanitary Authority—Sewers—Discharge of Sewage on to Private Lands—Nuisance—Claim of Right for Inhabitants of a Parish—Injunction—Prescriptive Right in Third Parties to Drain into Sewers—Power of Sanitary Authority to stop existing and future Connections with Sewers—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 21, 299.

In an action by a landowner against a corporation (the urban sanitary authority for the borough of D.) for an injunction to restrain them from discharging or allowing to be discharged sewage upon his lands from the sewers vested in them so as to cause a nuisance, the defendants set up a prescriptive right based on the presumption of a lost grant by the plaintiff's predecessors in title to trustees for the benefit of the inhabitants of the borough to drain all sewage from any tenements built or to be built within the borough, and to discharge the same on the plaintiff's lands. This claim of right failed. It was proved, however, that there were a number of houses in the borough in respect of which prescriptive rights had been acquired to pass sewage into and along the sewers, and that there were other houses the connections of which with the sewers had been made with the consent or by the acquiescence of the defendants:—

Held, that an injunction could not be granted so as to interfere with the prescriptive rights that had been acquired, nor to oblige the defendants to stop up the connections of the other houses which they had sanctioned; but that an injunction must be granted to restrain the defendants from authorizing or directing any sewage to flow or be discharged on to the plaintiff's lands from sewers vested in them as the sanitary authority.

Attorney-General v. *Acton Local Board*, (1882) 22 Ch. D. 221, and *Attorney-General* v. *Clerkenwell Vestry*, [1891] 3 Ch. 527, followed.

Held, also, following *Ainley* v. *Kirkheaton Local Board*, (1891) 60 L. J. (Ch.) 734, that a householder has an absolute right under s. 21 of the Public Health Act, 1875, to connect his drains with a sewer, subject only to the regulations prescribed by the local authority in whom the sewer is vested as to the manner in which the connections are to be made, and therefore that an injunction could not be granted to restrain the defendants from allowing any future connections to be made with their sewers.

Charles v. *Finchley Local Board*, (1883) 23 Ch. D. 767, dissented from on this point.

Held, further, that the plaintiff ought to have applied to the Local Government Board under s. 299 of the Public Health Act, 1875, to make an order on the defendants to adopt a proper system of sewage for their district.

THIS was an action by Major Brown, the owner in fee of Dunstable Park, and his tenant Henry Brown against the

corporation of Dunstable, who were the urban sanitary authority of the borough of Dunstable, for an injunction to restrain the defendants from discharging, or allowing to be discharged or to flow, into or upon the said lands and hereditaments or any part thereof any water, sewage, or foul or noxious matter, and from allowing any water, sewage, or foul or noxious matter to flow or to be discharged from sewers or drains belonging to or vested in the defendants in such a manner as to flow on to the said lands and hereditaments, or any part thereof, and from causing any nuisance to the plaintiffs or either of them.

Dunstable Park is situated partly in the borough of Dunstable and partly in the parish of Houghton Regis, in the county of Bedford. It was acquired by Major Brown's father in 1819. He died in 1846, having by his will devised it to his widow for life, and, after her death, to Major Brown in fee. The widow died in 1875.

Dunstable is an ancient town. Down to 1863 it was an ordinary parish. In 1863 a local board of health was constituted. In 1864 the town was for the first time incorporated as a municipal borough, and in 1888 the corporation became the sanitary authority for the urban sanitary district of the borough of Dunstable under the provisions of the Public Health Act, 1875.

The plaintiffs by their statement of claim alleged that the defendants had from time to time constructed a system of drains and sewers for the purpose of draining the borough of Dunstable, which drains and sewers were vested in and under the control of the defendants. That as part of such system the defendants had constructed sewers along various streets and roads within the said borough, and had constructed main sewers along High Street and Church Street within the said borough, and had connected with the said main sewers the other drains and sewers within the borough in such a manner that almost the entire sewage and drainage of the said borough flowed into the said main sewers. That the defendants had constructed drains, pipes, and other channels leading from the said main sewers to Dunstable Park, and by means of such

COZENS-HARDY J.

1899

BROWN v. DUNSTABLE CORPORATION.

drains, pipes, and channels the defendants discharged almost the whole of the sewage and drainage of the borough of Dunstable on to Dunstable Park. That the said acts of the defendants were wrongful, and by reason thereof a vast quantity of water mixed with sewage and foul and noxious matter was discharged from the sewers and drains vested in the defendants on to Dunstable Park, and caused an intolerable nuisance to the plaintiffs. That the plaintiffs had frequently requested the defendants to abate the said nuisance, which they had neglected to do, and the plaintiffs claimed relief as above stated.

The defendants by their defence alleged that, prior to their becoming such urban sanitary authority as aforesaid, the system of disposal of sewage in the borough of Dunstable was chiefly by means of dome wells or cesspools, but that certain sewers, and in particular sewers along High Street and Church Street, had been constructed many years ago for the purpose of carrying off surface water from the streets of the town and discharging the same into certain places, amongst others into ponds and ditches in Dunstable Park, and that the said sewers and ditches had been in existence for many generations and formed part of the former system of sewers for the town of Dunstable; and the defendants claimed that they and their predecessors in title had acquired the right to convey such water along such sewers and to discharge it into the said ditches and ponds. Alternatively (by amendment allowed at the trial) the defendants pleaded that the owners in fee of Dunstable Park granted to trustees for the benefit of the inhabitants of the parish of Dunstable the right to drain all surface water coming upon the streets of the said parish, and all sewage and drainage from any messuages or tenements built or to be built within the said parish, and to discharge such water and sewage through ditches or sewers on to Dunstable Park, but that such grant had been lost; and that the plaintiffs had acquiesced in and taken advantage of the existing system of sewage.

The defendants also alleged that at the time they became the urban sanitary authority of Dunstable and for many years previously certain inhabitants of the town of Dunstable had

connected their house drains with the said sewers, by means of which the sewage of the said houses passed into such sewers and was discharged into the said ditches and ponds in Dunstable Park. Such house connections were made without the sanction or authority of the defendants or their predecessors in title to the said sewers, and had existed for many years prior to the defendants becoming such urban sanitary authority as aforesaid, and the respective owners and occupiers of such houses had acquired a prescriptive right so to discharge the sewage of the said houses into the said sewers, which the defendants submitted they were unable to stop or interfere with except on condition of providing a substituted drainage system. They also alleged that certain other owners or occupiers in Dunstable had connected their house drains with the said sewers without the sanction or authority of the defendants, and that they were not liable for the action of such last-mentioned owners or occupiers. They admitted that as the urban sanitary authority they had constructed certain drains and sewers for carrying the surface water along the streets, but not so as to increase the existing servitude upon Dunstable Park. They denied that any of their acts were wrongful or that an intolerable nuisance was caused to the plaintiffs, and they stated that they intended forthwith to take the necessary steps under the provisions of the Public Health Act, 1875, to carry out a proper system of drainage for the borough of Dunstable.

Issue was joined. The existence of the nuisance was not seriously contested. It appeared from the evidence that the system of drainage prior to the year 1869 was principally by dome wells or cesspools, but that by that year some 610 houses had become connected with the sewers. In 1880 a town hall was erected on the site of an old building, and its drains were connected with the sewers. In 1886 the number of houses connected with the sewers was 1162, and since then the number had increased. The other material facts sufficiently appear in the arguments and judgment.

Eve, Q.C., and *W. M. Cann*, for the plaintiffs. For the purpose of this action the right to drain the surface-water into

COZENS-HARDY J.

1899

BROWN v. DUNSTABLE CORPORATION.

the sewers and to discharge the same on to Dunstable Park is not disputed, but the defendants have no right to cast a large and increasing mass of sewage on to the plaintiffs' lands. It is an actionable nuisance at common law, and its continuance can be restrained by injunction. The defendants may rely on *Glossop* v. *Heston and Isleworth Local Board* (1), but it is distinguishable. There the defendants had done nothing to create or increase the nuisance. Here the defendants have grossly neglected their duty, and are liable for allowing house sewage to be connected with these sewers. They ought to have exercised their statutory powers under s. 21 of the Public Health Act, 1875 (2), and have simply disconnected the drains, and so have prevented the nuisance: *Charles* v. *Finchley Local Board*. (3) The facts of that case are not directly in point, but in his judgment Pearson J. (4) dealt with s. 21, and held that where a local authority can physically on their own premises stop a nuisance and do not do so, they are liable.

(1) (1879) 12 Ch. D. 102.

(2) The Public Health Act, 1875, enacts:—

Sect. 21: "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications.

"Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of this section shall be liable to a penalty not exceeding twenty pounds, and the local authority may close any communication between a drain and a sewer made in contravention of this section, and may recover in a summary manner from the person so offending any expenses incurred by them under this section."

Sect. 299: "Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers . . . . the Local Government Board, if satisfied, after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, such order may be enforced by writ of mandamus, or the Local Government Board may appoint some person to perform such duty . . . ."

(3) 23 Ch. D. 767.

(4) Ibid. 775.

The distinction between such a case and a case where it is physically impossible to stop the connection is pointed out by Romer J. in *Attorney-General* v. *Clerkenwell Vestry*. (1) The defendants say they are not liable for the acts of others, but they have permitted connections to be made which they could have prevented. The plaintiffs also complain of the drains of the new town hall having been connected with the sewers, and of the reversal of the gradient of a sewer in High Street whereby the drainage of some houses which formerly flowed in another direction has now been cast on to Dunstable Park. The plaintiffs are also entitled to an injunction to restrain all future connections being made with these sewers: *Attorney-General* v. *Acton Local Board*. (2)

A. T. Lawrence, *Q.C.*, *Hughes*, *Q.C.*, and *Kenyon Parker*, for the defendants. Dunstable is an old town, and these sewers, which are not mere surface drains but lie under the roads, are very ancient, and have undoubtedly carried the surface drainage on to Dunstable Park for very many years. On the evidence the inference is that these old sewers were constructed not only for surface water but for sewerage, and where there has been long-continued user the Court will presume a legal origin. There can be a grant to trustees for the benefit of the inhabitants of a parish: *Haigh* v. *West* (3); *Gateward's Case* (4); *Grimstead* v. *Marlowe*. (5) Such a grant might have been made without foreseeing what it might grow to. Here some 610 houses were connected with these sewers in the year 1869. The only theory that harmonises with the whole is a lost grant. The plaintiff Major Brown is himself the owner of several houses in the borough the drains of which are connected with the sewers, and has therefore taken advantage of and acquiesced in the prescriptive rights that are claimed. At any rate, no injunction can be granted against the defendants in respect of those houses which have acquired a prescriptive right to drain into the sewers: *Attorney-General* v. *Acton Local Board* (2); *Attorney-General* v. *Dorking Union*. (6) As to

(1) [1891] 3 Ch. 527.
(2) 22 Ch. D. 221.
(3) [1893] 2 Q. B. 19.
(4) (1607) 6 Rep. 59 b.
(5) (1792) 4 T. R. 717.
(6) (1882) 20 Ch. D. 595.

COZENS-HARDY J.

1899

BROWN v. DUNSTABLE CORPORATION.

Charles v. *Finchley Local Board* (1), that really was not the case of a drain within s. 21 of the Public Health Act, 1875. The decision can be supported on common law grounds apart from the section; but so far as the judgment is founded on the section, it cannot be supported. The right of a householder to connect his drain with a sewer is absolute, subject only to the regulations of the local authority as to the mode of communication: *Ainley* v. *Kirkheaton Local Board.* (2) It is physically impossible to stop communications with these sewers; it would leave Dunstable without any system of drainage. On the balance of convenience no injunction should be granted. The plaintiffs should have applied under s. 299 of the Public Health Act, 1875, to the Local Government Board: *Pasmore* v. *Oswaldtwistle Urban Council.* (3)

Eve, Q.C., in reply. The nuisance exists and is increasing. The defendants assert a prescriptive right based on the presumption of a lost grant for the inhabitants of the parish to discharge sewage to an unlimited extent and of all kinds on to Dunstable Park. Such a grant could only have been made prior to 1846, when the last owner in fee of the property died; but the evidence of user before that date is too slight to support the inference of such a right. There is no authority that, in the absence of express stipulation, a right can be acquired to compel a man to submit to an easement secretly enjoyed and perpetually changing in the quantity of inconvenience imposed by it: *Lemmon* v. *Webb* (4); Gale on Easements, 6th ed. p. 461. Assuming that some leaseholders have acquired a prescriptive right to discharge their sewage into the sewers, the defendants have the control of the sewers, and an injunction may be granted against them to prevent further communications with a sewer which already causes a nuisance: *Attorney-General* v. *Richmond* (5); *Metropolitan Board of Works* v. *London and North Western Ry. Co.* (6); *Attorney-General* v. *Acton Local Board.* (7)

Cur. adv. vult.

(1) 23 Ch. D. 767.
(2) 60 L. J. (Ch.) 734.
(3) [1898] A. C. 387.
(4) [1894] 3 Ch. 1; S.C. on appeal [1895] A. C. 1.
(5) (1866) L. R. 2 Eq. 306.
(6) (1881) 17 Ch. D. 246.
(7) 22 Ch. D. 221.

May 19. COZENS-HARDY J. This is an action in which Major Brown, the owner of Dunstable Park and also of house property in the borough of Dunstable, claims an injunction to restrain the corporation from continuing what is alleged to amount to a nuisance of such a nature as to materially diminish the value of his property. Before considering the various points of law which have arisen, it is desirable to state what I find to be the result of the evidence. Major Brown's title is derived under the will of his father who died in 1846, having devised the property to his widow for life, who died in the year 1875, with remainder to Major Brown in fee. Major Brown's tenant in occupation of the park is co-plaintiff; but I shall in future speak only of Major Brown as plaintiff.

Dunstable is an ancient town. Two Roman roads, namely, Watling Street and Icknild Way, crossed each other at this point. It was nothing more than an ordinary parish until 1863, when a local board of health was formed, and in 1864 for the first time it was incorporated as a municipal borough. There are along Watling Street, which is now High Street, sewers of great age. Through these sewers surface water from the streets has, as far as living memory goes, flowed in three directions, part through the drain or pipe under what is known as Perkins House in High Street, and thence into a pond in the park, the overflow of which goes to a low-lying piece of land near the railway embankment. Another part crosses Icknild Way, now known as Church Street, and then enters land not belonging to Major Brown; but this also ultimately finds its way into the low land near the railway embankment. The third part went, until recently, in a comparatively short sewer in the High Street towards the north, outside the boundary of the parish, to a field formerly belonging to Major Brown known as the Dog Kennel Close. It has been proved that these ancient sewers have for many years conveyed not only surface water, but also slops and foul matter coming from house drains, the consequence of which was that the open ditches or receptacles in Dunstable Park and in Dog Kennel Close became from time to time offensive. It is proved that as far back as 1869 no less than 610 houses were connected with the sewers.

COZENS-HARDY J.

1899

BROWN v. DUNSTABLE CORPORATION.

With reference to sewage matter, other than slops or house drains, I am not satisfied that it found its way into the sewers to any considerable extent until after the year 1873, when for the first time a water company supplied the town with water. I think it probable that there were a few water-closets prior to that date which were flushed by means of rain-water cisterns, and there may have been a few privies the contents of which found their way into one or other of the sewers; but, speaking generally, I am satisfied that the ordinary mode of dealing with sewage of this nature was by cesspools which were periodically emptied. In 1887 part of the Dog Kennel Close was sold by Major Brown, and the pond into which the overflow from the third sewer above mentioned used to pass was filled up. Two dome wells were constructed nearer the road in order to receive and retain the sewage and other matter which formerly went to the pond, and Major Brown covenanted with the purchaser (in effect) to prevent any sewage matter from coming on to the land. In 1890 Major Brown sold the rest of the Dog Kennel Close, including the two dome wells. These soon proved a nuisance, and the corporation, with a view to remedy this nuisance, reversed the gradient of the third sewer, so that the fall was towards the south instead of towards the north, and the contents of this sewer, which formerly discharged into Dog Kennel Close, thenceforward passed under Perkins House into Dunstable Park. For thirty years complaints have been made of the inadequate drainage of Dunstable, and letters have repeatedly been addressed by the Local Government Board to the corporation on the subject. But the corporation have contrived, by means of a masterly inactivity, which it is impossible not to admire, to defy all attacks and to do nothing for more than a quarter of a century. At the present time there is a foul pond of several acres in extent in Dunstable Park, and it is this of which the plaintiff complains. The surface is so clogged with filth coming from the sewers that the water will not pass away into the chalk. I am satisfied that the value of Dunstable Park is substantially lessened by reason of its being made the receptacle for the sewage of a large part of Dunstable, but there is no evidence of any injurious effect upon health. I

ought to add that among the houses which thus drain into Dunstable Park are a number of houses belonging to Major Brown, and that some of them drain by means of the Church Street sewer, passing through the land of other persons before reaching Dunstable Park. I may observe that the Attorney-General is not a party, and that no public nuisance is alleged, and, further, that no mandamus is, or could be, asked for in this action.

In this state of facts, several distinct questions arise for my decision. The defendants, by an amendment which I allowed at the trial, allege that the owners in fee of Dunstable Park granted to trustees for the inhabitants of the parish the right to drain all surface water of the parish and all sewage and drainage from any messuages or tenements built or to be built within the said parish, and to discharge such water and sewage through ditches or sewers on to Dunstable Park, but that such grant has been lost; and they further allege that the plaintiff has acquiesced in and taken advantage of such grant and uses the existing system of sewage. This claim, if well founded, disposes of the whole action. But in my judgment it cannot be maintained. A lost grant is a valuable legal fiction devised to support long-continued possession and oft-repeated acts which otherwise could not be legally justified. Thus prior to the Prescription Act, it was the custom to direct juries to find a lost grant after more than twenty years enjoyment of an easement; and *Haigh* v. *West* (1) is a modern example of the use of this fiction. But the evidence in the present case falls far short of what is requisite to raise the presumption of a lost grant. Such a grant must have been made before 1846, and the state of things existing at that time was essentially different from the present state of things. It would be highly dangerous to allow the trivial and occasional passage, along a natural channel, of water more or less contaminated to ripen into a legal claim to pour sewage of all kinds and of indefinite amount along such natural channel. I therefore hold that the defendants' claim of right fails, and I must grant an injunction to restrain them from exercising that alleged right.

(1) [1893] 2 Q. B. 19.

COZENS-HARDY J.

1899

BROWN v. DUNSTABLE CORPORATION.

This, however, by no means disposes of this action, and it remains to consider what, if any, further relief the plaintiff is entitled to. In the first place, there are a large number of houses in respect of which prescriptive rights to pass sewage into and along the sewers have been gained, and it is plain that no injunction can be granted which will interfere with such rights. For this reason, amongst others, it is impossible for me to make an order which will involve the complete closing or abandonment of the sewers. In the second place, there are other houses the connections of which with the sewers have been made with the consent or by the acquiescence of the defendants, and it is settled law that I cannot interfere with them: *Attorney-General* v. *Clerkenwell Vestry*. (1) In the third place, there are a few houses which have been connected with the sewers in spite of the protest of the defendants, and the plaintiff contends that the defendants ought to stop up these connections. But I think the defendants must be taken to have acquiesced in that to which they at first objected, so that these houses really fall under the second head. If, however, I am wrong in this, they must be treated as falling under the fourth head. In the fourth place, the plaintiff contends that an injunction ought to be granted to restrain the defendants from allowing any future connection to be made. The defendants are willing, if they fail, as I hold they have failed, in their claim of right, to undertake not to authorize or direct any such connection; but beyond this they will not go. The strength of the plaintiff's case lies in this—that the defendants can, without being guilty of any trespass, stop up any future connection with their sewers, and it is urged that this is the true test, and that which has been applied by the Court in similar cases. On the other hand, it is urged that under s. 21 of the Public Health Act, 1875, a householder adjoining the sewer has a right to connect his house with the sewer, and could obtain an injunction if the defendants absolutely refused on any terms to allow him to connect his house with the sewer. It is necessary to consider some of the authorities cited by counsel on this point. In the case of *Attorney-General* v. *Dorking Union* (2) it

(1) [1891] 3 Ch. 527.

(2) 20 Ch. D. 595.

was held in 1882 by the Court of Appeal that where a sanitary authority had not themselves constructed the sewers which were a nuisance, but only permitted them to be used as formerly by the inhabitants, they could not be restrained by injunction. But Sir George Jessel (1) laid stress upon the fact that the defendants could not physically put an end to the nuisance, and could only proceed by means of action for injunction against persons who, with or without legal justification, were pouring sewage matter into the defendants' sewers. Sect. 21 of the Public Health Act, 1875, was cited; but Sir George Jessel does not seem to have considered that section to be material. In the same year, 1882, in the case of *Attorney-General* v. *Acton Local Board* (2), Fry J. refused to grant a mandatory injunction, which would compel the stopping up of existing drains, but he granted an injunction as to the future, restraining the defendants from directing or authorizing sewage to flow into the sewers in question, but he deliberately declined to insert in the injunction the word "permitting." In the following year, 1883, the case of *Charles* v. *Finchley Local Board* (3) came before Pearson J., who granted an injunction restraining the local board from allowing sewage to flow into a brook opposite the plaintiff's house on the ground that they could at any time physically put an end to the nuisance without any action at all. This decision was primarily based upon the fact that the defendants had given permission to the third person to lay down a pipe from his house to the brook to pass pure water only, and that as he, in breach of their permission, was sending sewage through the pipe, they could and ought to revoke the permission. This may be a sufficient ground for the decision. But the learned judge (4) expressly held that the local board had a right under s. 21 of the Public Health Act, 1875, to abate the nuisance without asking any leave and without bringing any action. Now s. 21 is as follows: [His Lordship read the section, and continued:—]

I am not satisfied that in *Charles* v. *Finchley Local Board* (3) there was any sewer to which s. 21 would be

(1) 20 Ch. D. 606.
(2) 22 Ch. D. 221.
(3) 23 Ch. D. 767.
(4) Ibid. 775.

COZENS-HARDY J.

1899

BROWN v. DUNSTABLE CORPORATION.

applicable; but this does not diminish the weight to be attached to the deliberate opinion of Pearson J. He certainly held that the local board could prevent an adjoining owner from connecting with the sewer. In 1891, in the case of *Ainley* v. *Kirkheaton Local Board* (1), Stirling J. held that under s. 21 a right is given to the owner or occupier to drain into an existing sewer, without reference to the question whether sewage matter if it once enters the sewer occasions a nuisance to a third person. This absolute right is no doubt subject to any regulations in respect of the mode of making connections and subject to the control of any person appointed to superintend the making of the connections; but no regulations can justify an absolute refusal to allow a connection to be made on any terms. No regulations under s. 21 have been made by the defendants. But certain by-laws were made by their predecessors, the local board of health, in 1864. The 20th by-law is the only relevant by-law, and I assume that it is in force. It prescribes no notice, and it only directs that the drains of all houses shall be connected with the sewers in such manner as the local surveyor shall direct. It is obvious that under this by-law the surveyor can only prescribe the manner of connection. He cannot refuse to allow any connection. Upon consideration I adopt the view of Stirling J. in preference to the view of Pearson J., and I must follow the precedent of Fry J. and decline to grant an injunction which would prohibit the defendants from permitting or allowing fresh connections to be made, or, in other words, would oblige the defendants to stop up all future connections. A sanitary authority in whom sewers are vested has only a limited property in these sewers. It is not in the same position as an owner of a private sewer who can absolutely prevent any one from touching his property. It seems to me that the plaintiff has mistaken his remedy. He ought to have applied to the Local Government Board to make an order under s. 299, which might ultimately be enforced by writ of mandamus. There are two minor points which I have not overlooked. It is said that the defendants ought to be restrained from allowing the sewage from the town hall to pass

(1) 60 L. J. (Ch.) 734.

into the sewers. But the defendants are sued as the urban sanitary authority only, and not as owners of the town hall. I am not satisfied that the town hall has not a prescriptive right; but, however that may be, I am not prepared to give the plaintiff a relief which is not sought by the pleadings. Again, it is said that the reversal of the gradient of the sewer in High Street for the purpose of bringing the Dog Kennel sewage into Dunstable Park increased the burthen on the plaintiff's property, and was an illegal act on the part of the defendants. But I think it was really done in order to satisfy Major Brown's complaints, and to relieve him from the legal liability which rested upon him by reason of his covenant. The houses draining into this short reversed sewer are those which drained into the unreversed sewer and are few in number, and I cannot interfere with their de facto enjoyment of the sewer. To grant an injunction in respect of these two matters might occasion serious danger to health without conferring any benefit upon the plaintiff, and this is a consideration to which weight ought to be attached. The result is that I must grant an injunction restraining the defendants, as the urban sanitary authority of the borough of Dunstable, from directing or authorizing any sewage or foul matter to flow or to be discharged from sewers or drains vested in them as such sanitary authority on to Dunstable Park. With respect to the costs, I think it is not possible to distinguish the costs attributable to the claim of the defendants of a right to send sewage on to Dunstable Park from the other costs; and I see no reason why the defendants should be relieved from any part of the costs of this litigation.

Solicitors for plaintiff: *Walls & Stallard.*

Solicitors for defendants: *Maples, Teesdale & Co., for Benning & Son, Dunstable.*

H. L. F.

C. A.
1897
ROMER J.
July 13, 14.

1898
Jan. 25, 26, 27, 28, 29; *Feb.* 1, 2, 3, 8, 9, 10, 15, 16, 17; *May* 10.

C. A.
1899
April 27, 29; *May* 1, 2, 3, 5, 6, 8; *June* 26.

LAGUNAS NITRATE COMPANY *v.* LAGUNAS SYNDICATE.

[1896 L. 1196.]

Company—Memorandum and Articles of Association—Promoters—Directors, Duties of—Fiduciary Relation—Appointment of Directors of one Company as Directors of the other—Contract—Sale by Directors in one Character to themselves in another—Dual Relation—Independent Board—Contract by Company with its Directors—Agency—Prospectus—Concealment from Shareholders of Material Facts—Misrepresentation—Misfeasance—Breach of Trust—Vendor and Purchaser—Voidable Contract—Rescission—Damages—Delay—Change of Position.

The L. Company was promoted and formed by the directors of the L. Syndicate for the purpose of purchasing part of the property of the syndicate, consisting of nitrate works. The directors of the syndicate prepared and signed the memorandum and articles of association of the company, the articles nominating them as directors and stating specifically that they were also the directors of the syndicate. They also prepared the company's prospectus and purchase contract, and affixed the seals of the syndicate and of the company to the latter. The company's solicitors and secretary were also the same as those of the syndicate. Two years after the date of the contract and the completion of the purchase the shareholders of the company, believing that their property had been purchased at an over-value and that there had been misrepresentations in the contract and prospectus, appointed an independent board of directors who, after investigating the facts and with the sanction of a general meeting of the shareholders, brought an action against the syndicate and the directors for rescission of the contract and damages on the ground of misrepresentation, misfeasance, breach of trust, and concealment of material facts, but not alleging fraud. From the date of the contract and down to and also since the commencement of the action the company had, first by its original directors and afterwards by its independent board, carried on business and worked the property the subject of the contract. At the trial Romer J. dismissed the action.

On appeal by the company :—

Held, by Lindley M.R., and Collins L.J., that the company was not entitled to rescission or damages, for (1.) at the date of the contract the company had, by its memorandum and articles, notice that its directors were also the vendors or agents of the vendor syndicate, and the mere fact that its directors did not constitute an independent board was not a sufficient ground for setting aside the contract; (2.) there had been no misrepresentation made to, or any material fact concealed from, any of the persons who were members of the company at the date of the contract, those persons being the directors themselves; (3.) although the contract

and prospectus were, on the evidence, misleading in certain particulars which would have entitled the company at the time to repudiate the contract, yet through the subsequent alteration of the property consequent on its being worked by the company, the position of the parties had been so changed that they could not be restored to their original position; and (4.) the defendants, the directors, had not been guilty of such negligence or breach of trust as to render them liable in damages in law for the loss occasioned to the company, or in equity to make good the loss.

But *held*, by Rigby L.J., (1.) that, in the promotion of the company, the preparation and sealing of the contract, and the preparation and issue of the prospectus, the original directors had, while acting as sole agents for the vendor syndicate, constituted themselves sole fiduciary agents for the purchasing company, and that the company was therefore entitled to rescission (but accounting for the profits of its working) on the principle that no fiduciary agent can bind his principal by a sale to him of such agent's property, where the principal has purchased without independent advice; and that the notice in the memorandum and articles of the company of the double relation of its directors was ineffectual to discharge them from the obligations involved in that principle; and (2.) that the company had not lost its right to rescission either (*a*) through delay—for time did not run during the domination of the original directors and the non-disclosure by them of material facts—or (*b*) through alteration of the property, the alteration having been in effect the act of the vendor syndicate by its directors.

Erlanger v. *New Sombrero Phosphate Co.*, (1878) 3 App. Cas. 1218, and *Salomon* v. *Salomon & Co.*, [1897] A. C. 22, discussed.

Statement of the principles as to (1.) the fiduciary relationship between the promoters of a company and its shareholders; (2.) the validity of contracts between a company and its directors as promoters; (3.) the non-liability of directors for losses when acting intra vires and honestly; (4.) the voidability of a contract for misrepresentation; and (5.) the impossibility of rescinding a contract after change of position.

In the year 1889 the Lagunas Syndicate, Limited (hereinafter called "the syndicate") was incorporated under the Companies Acts with a capital of 110,000*l.* in 1100 shares of 100*l.* each, its principal object being to acquire, by agreement with Colonel John Thomas North, certain nitrate deposits and works known as the "Lagunas Nitrate Works," consisting of 548 estacas of land in Chili, and the buildings, plant and machinery in and about the same, and to resell portions of these properties to companies intended to be formed by the syndicate. An estaca is a Spanish measure equivalent to from six to seven English acres. In the same year the syndicate acquired this property from Colonel North at the price of 110,000*l.*, payable

C. A. 1899

LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

as to 109,300*l.* in fully paid-up shares of the syndicate and as to the balance, 700*l.*, in cash. In 1890 the syndicate increased its nominal capital to the total amount of 275,000*l.*

In the early part of 1894 the syndicate, through its board of directors, resolved to promote a company for purchasing 200 of the 548 estacas, together with an "oficina" or factory, otherwise called a "maquina," erected thereon for the manufacture of nitrate of soda, with the plant and stock and a certain supply of water; the price to be 850,000*l.*, payable as to 550,000*l.* in cash, and as to the balance, 300,000*l.*, in fully paid-up shares of the intended company.

The directors of the syndicate then prepared the memorandum and articles of association of the intended company, and thereby provided that the company should carry into effect an agreement of June 18, 1894, hereinafter mentioned, a draft of which they had also themselves prepared. They also prepared the draft of a prospectus for issue to the public. The directors of the syndicate, and the actual promoters and creators of the company, were seven in number, namely, Colonel J. T. North, Robert Harvey, Richard Robertson Lockett, Edward Edmondson, George Fleming, Thomas Douglas Murray and Maurice Jewell. On June 15, 1894, the company was registered under the Companies Acts with the title of "The Lagunas Nitrate Company, Limited" (hereinafter called "the company"), having a nominal capital of 900,000*l.* in 180,000 shares of 5*l.* each, the memorandum and articles of association being signed by the seven directors of the syndicate and two other persons. The memorandum of association stated that the company had been formed to acquire land and works of the syndicate and its engagements and liabilities with reference thereto; and particularly to complete and carry into effect (with such modifications, if any, as might be thought fit) an agreement already prepared and settled for the purchase of such property from the syndicate. Art. 5 of the articles of association required the directors of the company to complete and carry into effect (with such modifications, if any, as they might think fit) the agreement with the syndicate referred to in the memorandum of association. Art. 57 nominated the above-

named seven persons as the seven first directors of the company, stating that they were all directors, and the only directors, of the syndicate: it enabled the directors for the time being, at any time and from time to time, to appoint any other person as a director, but so that the total number of directors should not exceed the maximum prescribed number. It moreover empowered the directors to fill up any casual vacancy in the office of director by the appointment of a successor, who should hold office for the remainder of the time for which the predecessor in ordinary course would have held office. Art. 66 enabled the company, by extraordinary resolution, to remove any director. Arts. 82 and 83 conferred upon the directors extensive powers of acting for the company in all matters of business. By art. 96 no member of the company was to have any right to inspect any account or book or document of the company, except such as was actually conferred upon him by statute or should be authorized by the directors or by the company in general meeting.

Before any prospectus was issued, and before any other person in addition to the nine subscribers to the memorandum of association had joined the company, namely, on June 18, 1894, the agreement referred to in the memorandum and articles of association was entered into by the syndicate and the company under the common seals of both. By that agreement, after reciting that the syndicate was the owner of extensive nitrate grounds and property known as "Lagunas," in the province of Tarapaca in the Republic of Chili, and had recently erected on a portion of such ground an "oficina" with all usual and necessary plant and appliances capable of producing about 300,000 quintals of nitrate monthly, and had at considerable expense obtained a supply of water and conveyed it to the grounds in pipes, and had erected a pumping-station with engines, boilers and plant, so as to supply water sufficient for three oficinas: it was agreed (1.) that the company should purchase from the syndicate 200 estacas of the syndicate's nitrate grounds together with the said oficina and all its machinery, plant and appliances in complete working order, the purchase to include all the extracted caliche (i.e., the raw

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

product from which nitrate was manufactured) on the purchased grounds, all nitrate in course of manufacture, all live and dead stock on June 30, 1894, and the water-rights thereinafter mentioned, but not the manufactured nitrate in canchas (drying floors); (2.) that the company should be entitled to one-third of the total existing water-supply of the syndicate, after providing thereout so much as should be required by the Nitrate Railways Company, Limited, under a contract which had been entered into with that company by the syndicate; (4.) that the company should pay to the syndicate as from June 30, 1894, one-third of the cost to the syndicate of maintaining the said water-supply; (5.) that the consideration for the sale should be 850,000*l.*; (10.) that the company should be bound by an agreement of July 1, 1890, between the Nitrate Railways Company, Limited, and the syndicate for the carriage of goods over the company's line for ten years, also by an agreement of August 19, 1890, whereby the syndicate had appointed the firm of North & Jewell (consisting of the above-named Colonel North and Maurice Jewell) port agents of the syndicate on the west coast of South America for a term of ten years, and by an agreement of December 21, 1891, whereby the syndicate had appointed the firm of W. & J. Lockett of Liverpool (in which the above-named Richard Robertson Lockett was a partner) the sole mercantile agents in England of the syndicate for ten years; and the company agreed to enter into contracts direct with the said railway company and the said Messrs. North & Jewell, W. & J. Lockett and Colonel North, to perform the obligations of the said agreements so far as they related to the purchased grounds; (12.) that the purchase-money should be paid, as to 300,000*l.* in fully paid shares of the company, and as to the balance, 550,000*l.*, in cash; (16.) that the company should pay all the costs, charges and expenses of the syndicate in connection with the sale; and (18.) that if the company failed to satisfy the syndicate on or before June 24, 1894, that the 600,000*l.* (being two-thirds of the company's capital) for which the public were by the prospectus to be invited to subscribe, had been subscribed for in cash and allotted to responsible persons, the syndicate might, by notice at any time before

September 30, 1894, the date fixed for the completion of the contract, annul the sale.

The agreement having been executed, the directors of the syndicate, in their names as directors of the company, issued to the public a prospectus of the company substantially in the form of the draft they had already prepared. This prospectus, which bore date June 18, 1894, the date of the agreement, invited subscriptions for 600,000*l.* of the nominal share capital of the company. It stated that the nitrate grounds of the syndicate acquired by the company were "believed to contain the richest deposit of caliche in the province of Tarapaca"; that the said oficina was "of the most improved modern construction, capable of manufacturing 300,000 quintals of nitrate of soda per month"; that the syndicate had obtained, and brought in pipes into Lagunas, a supply of water, and that the company would have the right of using one-third of the surplus water of the syndicate after supplying the requirements of the railway company; that the company would have the benefit of the said agreements with the said Messrs. North & Jewell and Messrs. W. & J. Lockett; that the syndicate was formed in 1889 with a view to acquiring and developing the Lagunas property, and that its original share capital represented only the prime cost of the grounds at a time when no railway communication with the coast existed; and that it was now selling (at a profit) to the company a portion only of its property, with an oficina "in complete working order." It further stated that the business would be taken over as a going concern as on June 30, 1894, and that the company would have the benefit of the contracts entered into by the syndicate for the supply of nitrate, and would also be bound by and have the benefit of the agreements referred to in the above agreement of June 18, 1894, and would also take over the services of the whole or greater part of the staff of the syndicate in connection with the oficina, "which is now already producing nitrate on a very important scale." It stated, moreover, the directors' belief that owing to the valuable nature of the caliche deposit, and the facilities of manufacture which would be possessed by the company, the profits from the production of nitrate would be

C. A. 1899 — LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

very large, "and that the manufacture of iodine would also prove a source of profit"; also that "in their opinion the company is acquiring the property at a favourable price and on conditions most satisfactory to the new company." It then went on to state that "the directors of this company are directors of the Lagunas Syndicate, Limited, and hold a considerable portion of the shares of that syndicate, and the purchase price has been fixed by them at 850,000*l.*, of which 300,000*l.* will be paid in fully paid-up shares of this company, and the balance in cash, and the remaining 50,000*l.* of the capital, after paying all expenses in connection with the formation of the company and the acquisition of its property (all which expenses are to be borne by the company), will, in the directors' opinion, supply sufficient working capital for carrying on the company's business." It then stated that the only agreement entered into was the above-mentioned agreement of June 18, 1894. The solicitors and secretary named in the prospectus were the same as those of the syndicate.

The applications for shares received in answer to the prospectus were very numerous, and far exceeded the number of shares actually allotted. The property comprised in the agreement of June 18, 1894, was duly conveyed to the company, which thereupon proceeded to work it, the syndicate, at the company's request, making considerable outlays upon it in putting the oficina in complete working order, and in providing further necessary water supply, which was completed in December, 1894. The business of the manufacture of nitrate of soda was for some time profitably carried on by the company, and large dividends were declared and paid. The 300,000*l.* worth of the company's shares received by the syndicate in part payment of the purchase-money for the property were forthwith sold by the syndicate at a premium.

In January and February, 1895, resolutions were passed by the syndicate for a voluntary winding-up, and liquidators were appointed, one of whom, George Fleming, was a director both of the syndicate and of the company. Towards the end of 1895 the shareholders of the company, being under the belief that their property had been purchased at an exorbitant price,

and that there had been misrepresentations in the purchase agreement and the prospectus, compelled three of the original directors to retire, and appointed three independent directors in their places. These new directors then investigated the facts connected with the formation of the company and the sale of the property purchased by it. On December 3, 1895, another independent director, a Mr. Porlitz, joined the board. In March, 1896, further independent directors were appointed, and by the death of Colonel North on May 9, 1896, the voting power of the board ceased to be under the control of the remaining syndicate directors. As the result of the investigation damages for misrepresentation were claimed by the company from the syndicate, but the company still continued to carry on their works. Ultimately, on June 12, 1896, the market price of nitrate and of the company's shares having fallen, the present action was commenced in the name of the company, upon the instructions of the new directors, against the syndicate, its liquidators, the said G. Fleming, E. Edmondson, R. Harvey, R. R. Lockett, and T. D. Murray, five of the original directors of the syndicate and the company, and the executors of Colonel North and Maurice Jewell, the other two, both deceased, claiming (1.) rescission of the agreement of June 18, 1894, and the return and delivery-up and surrender of all cash and shares paid or issued thereunder, with interest on such cash, and any dividends declared and paid on such shares, the plaintiff company accounting for any profits made by it in respect of the said property sold to it; (2.) payment by the defendants of the sum of 39,000*l.*, expended out of moneys of the plaintiff company in putting the oficina into proper working order, providing plant and appliances necessary for its proper working and making good alleged defective workmanship in its construction, with interest on such sum; (3.) an indemnity by the defendants in an action brought in the Queen's Bench Division by Messrs. W. & J. Lockett against the company to recover various sums of money alleged to be due under the said agreements of December 21, 1891 (the Lockett agreement), and June 18, 1894; (4.) alternatively, an account of all profits made by the syndicate and

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

the said directors, and payment to the company of the amount so due, with interest; (5.) damages as against the syndicate and the said directors, and the estates of such of them as were dead, for alleged misrepresentation, misfeasance, breach of trust and breach of warranty; (6.) damages as against the syndicate for alleged breach of contract to hand over the said oficina in complete working order and with all usual and necessary plant and appliances, and with all modern improvements, and with such proper water supply or with all usual and necessary plant and appliances as was provided for by the said agreement of June 18, 1894, with other incidental relief, including administration of the estates of Colonel North and Maurice Jewell, if assets were not admitted. The new directors then proceeded to summon a general meeting of the shareholders of the company for the purpose of explaining the position of affairs and obtaining their sanction to the prosecution of the action. The meeting was held on July 29, 1896, and a resolution was then passed by an overwhelming majority sanctioning the continuance of the action. This was followed by the retirement, on or about August 7, 1896, of the remaining syndicate directors, the management of the company being thus left entirely in the hands of the new directors.

Notwithstanding the action the company continued to carry on its business, having on July 28, 1896, given the defendants notice of its intention to do so and thus maintain its undertaking in working order in the interests of all parties until the questions in the action had been disposed of, but without prejudice to the company's rights. While so continuing to carry on their works, the company, in April, 1897, declared an interim 4 per cent. dividend, but under legal advice it was not paid. The works had since been stopped altogether.

The company did not base its action on fraud, which was not in fact alleged, but the grounds of action put forward by the company in its statement of claim were shortly these: First of all it was said that there had been misrepresentation in the prospectus and the agreement of June 18, 1894, in the following particulars: (1.) the nitrate grounds acquired by the company were not rich in caliche, as stated, but, on the con-

trary, the deposits were of inferior quality; (2.) the oficina was not in complete working order, nor of the most improved modern construction, nor capable of producing 300,000 quintals of nitrate of soda per month, or any such amount; on the contrary, the directors found themselves obliged to expend 39,000*l.* of the moneys of the company in putting the oficina in proper working order, in providing necessary machinery and plant for the proper making of an oficina, also in providing an iodine house, and in general repairs to make good defective workmanship; and (3.) the agreement with Messrs. W. & J. Lockett was so onerous that the company could not and did not derive any benefit therefrom, but, on the contrary, could only be and was in fact most injuriously affected thereby; (4.) the price and conditions on which the company acquired the property were neither favourable nor satisfactory. On the contrary, the price was most exorbitant, being 850,000*l.* for 200 out of the 548 estacas which the syndicate originally purchased for 110,000*l.* No such sum could have been obtained as the purchase price if the syndicate and the said directors had not, as in fact they did, excluded from the directorate of the company all persons except directors of the syndicate, these directors holding practically the whole of the shares of the syndicate; and (5.) the water supply was insufficient for working the oficina sold to the company. It was further alleged that the company had no independent advice before entering into the agreement of June 18, 1894, nor had it on its board any independent directors; that the agreement was entirely in the interest of the syndicate and the said directors, who never considered the interest of the company or its shareholders; that Colonel North never disclosed to the company the fact that he was, under some agreement with Messrs. W. & J. Lockett (the particulars of which the company did not at present know), entitled to a moiety of the profits derived by that firm from the said agreement between them and the syndicate of December 21, 1891, the obligations of which agreement the syndicate and the said directors purported by the agreement of June 18, 1894, to impose upon the company; that, purporting to act under the latter agreement, the said

C. A. 1899 — LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

directors paid, out of moneys belonging to the company, to the syndicate the sum of 550,000*l.* in cash, and issued to the syndicate or its nominees fully paid shares of the company to the nominal value of 300,000*l.*, and that such cash and shares were in fact received and retained by the said directors, who distributed the same among themselves and their friends and nominees. It was further alleged that there were no independent members of the board of directors of the company until the end of 1895, and that the real facts of the case were not disclosed to the company or its shareholders, but, on the contrary, were concealed by the syndicate and the said directors from the company and its shareholders, who first became aware of them from the investigation conducted by the three independent directors of the company appointed at the end of 1895.

The defendants, the executors of Colonel North, delivered a statement of defence in which they insisted that the sale and the other matters forming the subject of complaint in the action had been made and conducted in good faith and without any fraud or concealment, and submitted that the sale was binding on the company. They further alleged that the company had worked and manufactured nitrate out of and upon the property, the subject of the action, to a large extent, and were still in possession of and then working the same; and it was submitted that in any event, having regard to those circumstances and to the lapse of time, the company was not now entitled to rescind the sale.

The defendants the syndicate, its liquidators, and the five original directors of the syndicate and of the company, also delivered a defence denying the allegations of the company, and stating that the sale complained of was an honest transaction and was believed by the syndicate and its directors to be, and was in fact, at a fair and reasonable price and beneficial to the company, and that there had been no concealment in connection therewith; and further that all the material circumstances appeared from the company's prospectus and the documents therein referred to, and that the interests of the company had been fully protected by the syndicate and its directors.

They submitted that, having regard to the lapse of time and to the fact that the company had been in possession of and working the property comprised in the agreement of June 18, 1894, for upwards of two years, rescission of that agreement had become impossible and ought not to be granted, and they relied on the delay and laches of the company.

Issue having been joined, the action came on for trial before Romer J. on July 13, 1897.

The vivâ voce evidence given at the trial by the directors and others, the depositions of witnesses taken on commission in Chili, and the answers to interrogatories delivered by both sides, were very lengthy and voluminous. It appeared that several of the original directors were men experienced in nitrate grounds, and that the whole of the Lagunas property had been visited and thoroughly examined, prior to its purchase by the syndicate, by three of the directors—Colonel North, R. Harvey, and M. Jewell—all of whom were convinced of their richness in caliche; that the property had a high reputation and had been surveyed and reported upon on behalf of the Government of Chili, and had been partly worked; that the syndicate had moreover sent over an expert for the purpose of making an investigation and trial of the ground, upon which he reported in high terms; that the directors made various other inquiries as to the nature of the property; and that the directors in order to keep up the market price of nitrate of soda contemplated a combination of manufacturers, which it was intended the company should join. It appeared, moreover, that during the two years from the date of the company's incorporation to the date of the commencement of the action the company had worked out of its property and sold upwards of five million quintals of nitrate of soda. A mass of evidence was also adduced upon the questions whether at the time of the sale to the company the oficina was in complete working order and capable of manufacturing 300,000 quintals of nitrate of soda per month as represented in the prospectus and the agreement of June 18, 1894; also as to whether there was at the time a sufficient water supply to the oficina as represented. Upon these points it appeared that shortly after the date of the

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

contract, the directors of the company, at the request of the manager of the oficina, expended considerable sums in providing additional machinery for the purpose of increasing its productive capacity, and in the erection of additional buildings for workmen and other purposes; that at the date of the contract, and even on June 30, 1894, from which date the company was to be entitled to the profits to be derived from working the oficina, one-half of it was not in complete working order, and was not being worked, inasmuch as certain pipes had to be fixed and certain other work done upon it; but the work to be done was small in amount, and the directors of the syndicate had been led to believe it would be completed before the date of the contract. Owing, however, to various circumstances the work was not done until September 2, 1894, when it was completed at the expense of the syndicate. Upon the question of the water supply, this was proved to have been defective at the date of the contract, but the directors stated that they believed the defect to be temporary only and would be speedily put right at the expense of the syndicate, and that they believed the statements as to the water supply in the contract and prospectus were substantially true. The defect was, however, remedied and made good by December, 1894, by the syndicate itself at very considerable expense. Upon the question of the alleged excessive purchase price paid by the company to the syndicate, it appeared that the total sum expended by the syndicate in respect of the 548 estacas down to the sale of the 200 estacas, including at par the shares which went to make up the original purchase price of 110,000*l.*, was considerably less than 400,000*l.* The shareholders of the company were never informed of the price paid by the syndicate for the whole of the property originally purchased by it, nor of the profit made by the sale by the syndicate to the company. It also appeared, as the result of the evidence, that a considerable portion of the nitrate grounds sold to the company had been worked out at the time of the sale, and that a further large portion was not capable of being continued to be worked at a profit. With regard to the agreement between the syndicate and Messrs. W. & J. Lockett (the syndicate's

agents in England for the sale of nitrate), the obligations of which had been taken over by the company, it appeared that certain advances had been made under it to the syndicate by Messrs. Lockett. The other points of the evidence in the case sufficiently appear from the judgment of Romer J., and also in the judgments of the Court of Appeal.

G. I. F. C.

Swinfen Eady, Q.C., A. T. Lawrence, Q.C., A. R. Kirby, and *Peterson,* for the plaintiff company. The company was formed and promoted by the syndicate and its directors; as promoters the syndicate was in a fiduciary position towards the plaintiff company, and therefore bound to make a full and fair disclosure of all material facts; mere non-disclosure would be sufficient to establish a right to have the contract for sale rescinded; it is not necessary to establish direct misrepresentation; there was no independent board of directors, and that imposed greater obligations upon the vendors, who were also promoters: *Erlanger* v. *New Sombrero Phosphate Co.* (1) The directors of the syndicate are accountable for any profits made: *Lydney and Wigpool Iron Ore Co.* v. *Bird.* (2) The burden of proving that a full and fair disclosure of all material facts was made lies on the directors of the syndicate: *Dunne* v. *English* (3); otherwise the contract cannot be sustained: *Tate* v. *Williamson.* (4) Fraud is not charged against any of the defendants, but the plaintiff company is entitled to refer to the terms of the contract for sale of June 18, 1894, and to the prospectus to shew what representations were made by the syndicate at the time of the sale, many of which the evidence now shews to have been misleading and incorrect. The purchase price, too, was excessive, and the directors of the syndicate, when acting for the vendors and the company, had not sufficient grounds to justify them in fixing this price, especially as they had notice of the defects of the property sold. The defendant directors are liable for misfeasance, and for negligence for not having properly investigated the terms of the

(1) 3 App. Cas. 1218.
(2) (1886) 33 Ch. D. 85.
(3) (1874) L. R. 18 Eq. 524.
(4) (1866) L. R. 1 Eq. 528.

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

contract: *Marzetti's Case* (1); *Rance's Case.* (2) On these grounds we claim rescission of the contract of June 18, 1894, damages and consequential relief against the syndicate, and damages for negligence and breach of duty against the defendant directors and their representatives.

Cozens-Hardy, Q.C., Carson, Q.C., Hon. E. C. Macnaghten, Q.C., and *E. Russell Clarke,* for the syndicate, and the defendants other than Colonel North's executors. Fraud is not charged; misrepresentation short of fraud would no doubt be a ground for rescission, but it must be misrepresentation of such a material and substantial nature as to satisfy the Court that the property is of such a character as to make it materially different from that which it was represented to be, and of such a nature that the purchaser, had he been aware of the misrepresentation, would never have entered into the contract. *Erlanger's Case* (3), as explained by *Salomon* v. *Salomon & Co.* (4), does not warrant the plaintiffs' contention as based on the fact that there was no independent board. The fact that the property has not turned out quite as good as was expected is no ground for rescission. The plaintiff company cannot recover against the defendants personally on the ground that they entered into the contract and sanctioned the payment of the purchase-money without due consideration. Crassa negligentia must be proved: *Overend, Gurney & Co.* v. *Gibb.* (5) The directors admittedly acted honestly, and to say that they are personally liable for affixing the seal of the plaintiff company to the contract, which this company was practically formed to adopt, is inconsistent with this decision. Then there has been two years' delay before commencing this action, during which period the position of the parties has been altered, and more than five million quintals of nitrate have been taken out of the property and sold; the conduct of the plaintiff company deprives them of any right of rescission if they ever had any such right.

Crackanthorpe, Q.C., Farwell, Q.C., and *O. L. Clare,* for Colonel North's executors. To say that Colonel North's

(1) (1880) 28 W. R. 541.
(2) (1870) L. R. 6 Ch. 104.
(3) 3 App. Cas. 1218.
(4) [1897] A. C. 22.
(5) (1872) L. R. 5 H. L. 480.

executors are bound to discharge the duty of shewing the truth of the statements in the prospectus in consequence of their testator's fiduciary relationship to the plaintiff company is contrary to principle and all authority. No such duty is cast upon the executors; the burden is on those who impeach Colonel North's bona fides. On the question of rescission a company is in no better position than an individual shareholder; innocent misrepresentation is not enough unless it is such that there is a complete difference in substance between the thing bargained for and that obtained: *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (1) Then the speculative nature of this property must be considered; there is a great difference between a contract for the purchase of an hotel and a contract for the purchase of a speculative business like this, which the company was formed to buy; considering the absence of mala fides and the powers of the directors, no case has been made out for damages against us: *Overend, Gurney & Co.* v. *Gurney.* (2) Directors are not liable for ordinary negligence; what must be proved against them is crassa negligentia: *Baikie* v. *Chandless* (3); *Purves* v. *Landell* (4); *In re Kingston Cotton Mill Co.* (5) Some of the statements in the prospectus about the water supply and the completeness and capacity of the factory may have been ambiguous, but do not amount to misrepresentation: *Hallows* v. *Fernie.* (6) The fact that Colonel North's interest under the Lockett agreement was not precisely stated is not material: *Imperial Mercantile Credit Association* v. *Coleman.* (7) This is an action for negligence against executors which cannot be maintained; executors cannot be sued for damages caused by their testator except under certain statutes: *Kirk* v. *Todd* (8); *Phillips* v. *Homfray.* (9) No case for rescission of the contract or for damages against these defendants has been made out. It is a case of negligence or nothing so far as it is a case for damages; and so far as it is a case for

(1) (1867) L. R. 2 Q. B. 580.
(2) (1869) L. R. 4 Ch. 701.
(3) (1811) 3 Camp. 17.
(4) (1845) 12 Cl. & F. 91.
(5) [1896] 1 Ch. 6, 331; 2 Ch. 279.
(6) (1868) L. R. 3 Ch. 467.
(7) (1873) L. R. 6 H. L. 189.
(8) (1882) 21 Ch. D. 484.
(9) (1883) 24 Ch. D. 439.

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

rescission, these defendants are not proper parties because they were not parties to the contract.

Swinfen Eady, Q.C., in reply. We ask for rescission with all its consequences. Fraud is not necessary to obtain rescission; misrepresentation is enough: *Newbigging* v. *Adam* (1); *Adam* v. *Newbigging*. (2) Even as between strangers the facts are sufficient to warrant an order for rescission, and the case is stronger when you have vendors who are in a fiduciary capacity. Until there was an independent board of directors the contract was not binding. *Salomon* v. *Salomon & Co.* (3) does not limit the application of *Erlanger's Case* (4) on this point. It is not necessary to shew that all the statements in the prospectus were false; misleading statements are enough: *Aaron's Reefs* v. *Twiss* (5); *Redgrave* v. *Hurd* (6); *Rawlins* v. *Wickham* (7); *Hart* v. *Swaine*. (8)

[*Carson, Q.C.*, referred to *Soper* v. *Arnold* (9) and *Brownlie* v. *Campbell*. (10)]

It is not only a case of misrepresentation; there should have been full and fair disclosure. *Giblin* v. *McMullen* (11) shews the liability of directors for negligence. [He also cited *In re Faure Electric Accumulator Co.* (12); *Batthyany* v. *Walford* (13); *Leeds Estate, Building and Investment Co.* v. *Shepherd* (14); *Ramskill* v. *Edwards* (15); *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (16); *In re Sharpe*. (17)] Not only are the defendant directors liable, but the executors of deceased directors are also liable, for the directors were in such a fiduciary relation towards the company that the rule "Actio personalis moritur cum personâ" does not apply: *Concha* v. *Murrieta* (18); *Phillips* v. *Homfray*. (19)

Cur. adv. vult.

(1) (1886) 34 Ch. D. 582.
(2) (1888) 13 App. Cas. 308.
(3) [1897] A. C. 22.
(4) 3 App. Cas. 1218.
(5) [1896] A. C. 273.
(6) (1881) 20 Ch. D. 1.
(7) (1858) 1 Giff. 355; 3 De G. & J. 304.
(8) (1877) 7 Ch. D. 42.
(9) (1887) 37 Ch. D. 96.
(10) (1880) 5 App. Cas. 925.
(11) (1868) L. R. 2 P. C. 317.
(12) (1888) 40 Ch. D. 141.
(13) (1887) 36 Ch. D. 269.
(14) (1887) 36 Ch. D. 787.
(15) (1885) 31 Ch. D. 100.
(16) (1889) 44 Ch. D. 412.
(17) [1892] 1 Ch. 154.
(18) (1889) 40 Ch. D. 543.
(19) 24 Ch. D. 439.

1898. May 10. ROMER J. In this action the plaintiff company seeks relief against the Lagunas Syndicate, Limited, and against persons, or the representatives of persons, who at the time of the sale by the syndicate to the company were directors of both companies, on various grounds, which I shall have to refer to in detail. But fraud is not alleged against any of the defendants. The plaintiff company's counsel expressly stated that fraud was not and was never intended to be alleged.

I will first deal with the case against the defendant syndicate. Undoubtedly by its directors the syndicate promoted and was in a fiduciary relation to the company, and in its dealings with the company was bound to make a proper disclosure of all known material facts, and otherwise to exercise the good faith required from all persons occupying such a position. But, in the prospectus issued by the syndicate inviting subscriptions to shares in the company, it was fairly and plainly stated, and all original allottees of shares had full notice, that the syndicate was selling its property to the company at a profit, and at a price fixed by its directors, and that the directors of the syndicate and of the company were the same. Under these circumstances it appears to me that the company can have no ground of action against the syndicate, so far as it is based merely on the above-mentioned facts. The company, however, is entitled to refer to the terms of the contract of June 18, 1894, for the sale and purchase of the property, and to the contents of the prospectus, for the purpose of seeing what representations were made by the syndicate as to the property to be acquired by the company, and as to the company and its prospects of success. And the contention of the company is that when the statements in the contract and prospectus are compared with what the company alleges to have been the true position of affairs at the time, it is entitled, having regard to all the circumstances, to rescission of the contract, or failing that, then to damages.

Now, the company has attacked the description in the contract of the property and the contents of the prospectus in many points at an expenditure of time and money which has been in my opinion excessive, even when due regard is paid to

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Romer J.

the importance and difficulties of the case. And the conclusion I have come to is that the company has failed to establish before me any legitimate ground of complaint except in respect of two matters, namely, the state of the water supply at the date of the contract and for some time after, and the non-completion in some respects of one-half of the factory (or maquina, as it is called) until some short time after the contract. Before dealing with these two matters, I will shortly state the conclusions I have come to on the evidence before me upon all the other grounds of complaint relied upon by the company which appear to me to be of sufficient gravity to be separately mentioned.

The first complaint made by the company is that the purchase price fixed by the syndicate was excessive, and that the directors of the syndicate, acting for a vendor in a fiduciary position, had no sufficient grounds to justify them in fixing that price or in making the favourable representations contained in the prospectus as to the value of the property and the company's prospects of success.

Now, so far as the price is concerned, it is difficult to see how that alone could form a just cause of complaint if fixed by the directors of the syndicate in good faith, and bad faith is not alleged. But, beyond that, when the evidence and circumstances are considered, it appears to me that the directors at the time not only believed, but had reasonable grounds for believing, that the company was acquiring the property at a favourable price.

The property, from its nature, was of necessity of a speculative kind, and its value matter of doubt, and, moreover, the shareholders of the company were told the price was fixed by the syndicate. But the directors were not dealing with a property unknown to them, or as to which they had no grounds for forming any opinion of its value. Several of the directors were men experienced in nitrate grounds, and this particular ground had been visited by three of them, namely, Colonel North, Mr. Harvey, and Mr. M. Jewell. It had a high reputation, and had been surveyed and reported upon on behalf of the Government, and been partly worked. And the syndicate

had sent over Mr. R. Jewell, an expert, for the purpose of making, and he had made, an investigation and trial of the ground, which, in my opinion on the evidence as a whole, was proper and sufficient, and had reported in high terms of the ground. Moreover, inquiries were made in different ways by the directors, and on the evidence as a whole it appears to me that they had reasonable and sufficient grounds for the statements in the prospectus that the property was believed to contain the richest deposit of caliche in the province of Tarapaca, and that the directors believed the profits from the production of nitrate would be very large.

It was suggested on behalf of the company that the price fixed was so high as to preclude the hope of large profits accruing to the company from the purchase and working, and it was attempted to support this by elaborate calculations, based, however, on the price of nitrate at the time the evidence was given, and which was considerably lower than the price at the time of the contract. The proper way of considering the fairness of the price and the probability of large profits coming to the company is to regard the state of things existing at the time the company bought, and when that is done I think the company fails in establishing any legitimate cause of complaint on the above grounds.

In the next place, the company complains that (apart from the two special matters above mentioned, with which I have hereafter to deal) the oficina or factory was not capable of manufacturing 300,000 quintals of nitrate of soda per month as represented; and in support of this contention much evidence has been adduced. Without unduly lengthening my judgment I cannot discuss that evidence in detail, and I need only say that on the evidence as a whole it appears to me that, if sufficient men were employed and reasonable and proper means were taken, the oficina was capable of manufacturing at the rate specified.

The company further complains that, having regard to the size and character of the oficina described in the contract and prospectus, it was not at the date of the sale in complete working order. [His Lordship then stated the details of the

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Romer J.

alleged deficiencies, and said that no doubt the directors did shortly after the contract at the request of the managers of the factory expend considerable sums in increasing its capacity and in the erection of additional buildings for various purposes, but that he was satisfied on the evidence that this expenditure was not necessary to cure any defects in the oficina as represented and contracted to be sold by the syndicate, or to bring it up to the condition it ought to have been in according to the terms of the contract and prospectus, the expenditure being to a considerable extent due to the extravagant views of the manager for the time being. With regard to the complaint by the company that at the date of the contract an iodine house had not been erected, his Lordship said he could not find, on a fair reading of the contract or prospectus, any representation by the syndicate that it had been erected, or which would induce intending shareholders to believe so, and that an iodine house was not an invariable or necessary adjunct of nitrate works. His Lordship then proceeded :—]

The last of the charges of the company which in my opinion fail, that I need refer to specifically, concerns what is called the Lockett agreement. It is said that it was unduly onerous, and that in the prospectus more details of it should have been given, and Colonel North's interest under it should have been referred to. But the agreement was entered into years before the sale to the company, and its terms were considered fair and reasonable at the time, and that by persons acting for the then syndicate, who were interested solely as members of the syndicate. And though no doubt, in considering the agreement, the fact of the advances made by the Locketts should be borne in mind, I do not think it would or did occur, or ought to have occurred to the syndicate or its directors at the time of the sale to the company, that there was—or that in fact there was—anything so onerous or peculiar or important about the agreement as to render it necessary to refer with particularity in the prospectus to its terms, or to mention specifically Colonel North's interest thereunder. I am convinced there was no bad faith in this matter on the part of the syndicate or its directors —and, indeed, as I have already pointed out, bad faith is not

charged—and under the circumstances I do not think the company is entitled to rely on the facts relating to the agreement as entitling it to any relief.

I have now to deal with the two special matters above referred to, in respect to which, in my opinion, at the date of the contract the property contracted to be sold did not fully answer to its description in the contract and prospectus. The first of these concerns the condition of the maquina itself. From June 30, 1894, the company was under the contract of sale to be entitled to the profits to be derived from working the maquina, which was described as being in complete working order. As a matter of fact on June 30 one-half of the maquina was not in complete working order, and was not being worked, inasmuch as certain pipes had to be fixed and certain other work done upon it. But the work to be done was small in amount, and the directors of the syndicate had been led to believe it would be completed before the date of the contract. Owing, however, to various circumstances the work was not completed until about September 2, the date fixed for completion by the contract being the 30th. But the work was completed at the expense of the syndicate, and the delay was wholly unimportant, subject only to the question as to possible loss of profits by the half maquina not being worked between June 30 and September 2, which I will hereafter deal with.

The second of the two matters concerns the water supply to the maquina—undoubtedly a most important consideration, particularly having regard to the special provisions in the contract referring to it. [His Lordship then reviewed the evidence upon this point, and said he gave credit to the statements of the directors that at the date of the contract they believed that the defect in the water supply was temporary only and would be speedily put right at the expense of the syndicate, and that they believed the statements as to the water supply in the contract and prospectus to be substantially true; but that of course they were bound by those statements, and the plaintiff company was entitled to require that the property purchased should on June 30 be substantially in accordance with the description of it contained in the contract. Considering,

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Romer J.

however, the question from a practical and substantial point of view, he came to the conclusion that the water which since December, 1894, had been supplied to the company's maquina, and which the company was entitled to receive and the syndicate was bound to supply under the contract, was amply sufficient for the purposes of the maquina as described in the prospectus and contract, and to give to the company the full rights to which it was entitled under the contract. His Lordship then proceeded :—]

The result is that in my view the company has since December, 1894, been in possession of a property fully answering that described in the contract and prospectus, and that, if the company be paid any loss that may have accrued to it by the delay in remedying the two defects in the half maquina and water supply above dealt with, it will for all substantial purposes be placed in the same position as if on June 30 the property had in every respect then answered its description; and with regard to the loss that may have accrued by the delay, as to which I shall hereafter have to say more, it is to be noticed that the company has been and is now entitled to recover it from the syndicate on the ground of breach of contract. But I agree that in dealing with this case consideration must be paid to the position of affairs on June 30 as well as to subsequent events. Now, it is true that on June 30 the two defects above mentioned existed ; but, as I have already pointed out, the directors believed them to be merely temporary, and I do not think it occurred to them that there would be any difficulty or substantial delay in remedying them at the syndicate's expense, and, acting in this belief and in good faith, they on June 30 proceeded with the contract, and it has since been completed and the property conveyed and the purchase consideration paid. I need not pause to consider what would have been the rights of the company if the expectations of the directors had not ultimately been fulfilled and the defect in the water supply had not been made good, especially as the shareholders were not informed of the defects and subsequent delay, though the information was not withheld from any bad faith on the part of the directors.

The real question I have to consider is what the rights of the company were when this action was brought and the case came on for trial. And in considering what was done on and after June 30, it appears to me very material to remember the absence of any fraud on the part of the directors. It is said that though they acted in good faith the company was in no way affected by their acts or knowledge though they were its agents, because they were also directors of the syndicate; and it is suggested that, by reason of the conflict of interest arising between them in their two capacities, their powers as directors of the company were paralysed so far as concerns the subject-matter of the contract. But I think this is putting the case of the plaintiffs far too high. The original shareholders all knew the true position of their directors, who were in fact named in the articles of association, and the chief object of the company as described by the memorandum of association was to enter into an agreement in the form of the contract that was in fact signed, with such modifications, if any, as might be thought fit, and by the 82nd and 83rd of the articles of association powers were given to the directors so full as undoubtedly to authorize them to act as they did in giving time to the vendor to remedy defects in the property; and this being so, if they acted in the matter in good faith, I do not think their acts can be ignored by the company. The shareholders must have contemplated their acting on behalf of the company in reference to matters arising on the contract notwithstanding their position as directors of the syndicate. But in considering the rights of the company when this action was tried, not only the facts to which I have called attention, but also the events since December, 1895, when certainly the company attained a wholly independent board of directors, have to be considered. The contract clearly could not have been then rescinded or treated as rescinded at common law by reason of the above two original defects in the property. As to the kind of case which under any circumstances is necessary to be established at common law to rescind a contract, where the property has passed, in the absence of fraud, reference may be made to the judgment of the Court in *Kennedy* v. *Panama, New*

C. A.
1899
LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.
Romer J.

Zealand and Australian Royal Mail Co. (1) So that when the company at the trial claimed rescission it was seeking the equitable jurisdiction of the Court; and in administering equity the Court must consider all the material facts bearing on the question whether under the circumstances rescission ought to be granted. For example, in the absence of fraud, courts of equity have always paid considerable attention to the fact that the application is made after conveyance. See observations of Lord Selborne L.C. in *Brownlie* v. *Campbell* (2), in reference to the cases of *Wilde* v. *Gibson* (3) and *Hart* v. *Swaine* (4), and I think this Court is bound to consider the fact that the nitrate on this property has been extensively worked by the company, not only while its directors were also directors of the syndicate, but also since it obtained an independent board; and, further, that the company has continued to work the nitrate since the disputes arose and even since action brought down to the present time; and that this working has been without consultation with the syndicate, on whose behalf much might have been said as to the advisability of working at the ruling prices of nitrate for the time being and in the manner adopted by the company. Moreover, the working by the company since the disputes arose has been on a commercial scale for the dividend purposes of the company, and has not (as it appears to me) been limited to merely keeping the factory open as a going concern. In April, 1897, the directors of the company declared an interim dividend at the rate of 4 per cent., and only stayed the payment of it on the suggestion of its solicitors that it might prejudice the company's claims in this action. Now, I am not considering whether if a case of fraud had been made out the Court could have seen its way to prevent this working being a complete bar to a claim for rescission. But I think the working ought to be taken into consideration together with the other facts to which I have called attention in dealing with the claim for rescission, and, looking at all the circumstances, I think it would not be fair or equitable now to decree rescission of the contract. I quite agree that

(1) L. R. 2 Q. B. 580.
(2) 5 App. Cas. 937, 938.
(3) (1848) 1 H. L. C. 605, 620.
(4) 7 Ch. D. 42.

if the company had satisfied me, on looking at all the circumstances, that it was entitled to ask for rescission, I should not have allowed any option to the syndicate of paying damages or making good representations instead of rescinding: see *Rawlins* v. *Wickham* (1), and the authorities there cited, in all of which it is to be noted that nothing but rescission would have afforded complete or proper relief to the parties complaining. In the case now before me I think that justice will be done, and the company will obtain all the relief it is entitled to against the syndicate, by directing on the alternative claim of the company for damages for breach of contract an inquiry what loss or damage the company has sustained by reason of the maquina not being in complete working order on June 30, 1894, by reason of the two defects above mentioned, and by the continuance of those defects until they were remedied. I think a sufficient case has been established before me by the company to justify that inquiry, it having been arranged between the parties that in case of the Court being of opinion at the trial that the company was entitled to damages, the amount should be ascertained by inquiry. On behalf of the syndicate it was said that such an inquiry ought not to be directed in this action, and that it ought to be the subject of a fresh action or of a reference to arbitration under the arbitration clause contained in the contract. But the action is so framed as to bring before the Court a claim for such an inquiry. The costs of litigation between the parties has already been excessive, and it would in my opinion be a misfortune to both parties if I did not now deal with the questions as to damage by delay. I am satisfied that the facts shewing the company's right to the inquiry had fully to be gone into by both parties in this action and could not be controverted by the syndicate, even if further proceedings were allowed. I agree that the syndicate has not hitherto directed its attention to the exact amount of the damage; but as I am not now assessing the amount, it is not prejudiced by my now directing an inquiry. This disposes of the action as against the syndicate, subject to the question of costs.

(1) 3 De G. & J. 304.

C. A.
1899
LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.
Romer J.

I have now to deal with the case against the original directors of the company or their representatives. It follows, from what I have already said as to those directors not being guilty of bad faith, that substantially the company's case against them must be based on negligence on their part. Certainly nothing they have done was beyond their powers as directors. It is said on behalf of the company (putting its case shortly) that the directors became liable (1.) for entering into the contract without proper investigation, and (2.) for carrying it out and for paying the purchase-moneys with notice of the defects in the property. Now, directors are not liable, acting intra vires and in good faith, for loss accruing to their company by their acts, unless arising from what has been called "gross negligence" on their part. Exception has often been taken, and with good cause, to that phrase. But it has been frequently used in other cases besides those concerning directors, and has its use—inasmuch as there is a practical difference between the degrees of negligence for which different classes of persons are responsible—in being descriptive of that difference. The meaning of the phrase was fully discussed by Lord Chelmsford in delivering judgment in the case of *Giblin* v. *McMullen*. (1) Now, undoubtedly, directors have always been held by the Courts as being in a very favourable position as compared with other agents in respect of the degree of negligence which will make them liable to an action. A director is undoubtedly liable for acts done by him which he knows, or must be taken to have known, are ultra vires the company, and result in loss to the company (see, for example, *Hirsche* v. *Sims* (2)), and he cannot with impunity pay away the company's moneys without inquiring, if it subsequently turns out that they have been paid for a purpose to which it could not lawfully be applied: *Marzetti's Case*. (3) But, as pointed out in that case (see judgment of Brett L.J. (4)) and also in other cases, mere imprudence or want of judgment would not in itself make a director liable. And with reference to the position of the directors of the syndicate, the observa-

(1) L. R. 2 P. C. 336, 337.
(2) [1894] A. C. 654.
(3) 28 W. R. 541.
(4) Ibid. 543.

tions of Lord Selborne in *Hirsche* v. *Sims* (1) may be referred to, where he says: "If the defendants truly and reasonably believed at the time that what they did was for the interest of the company, they are not chargeable with dolus malus or breach of trust merely because in promoting the interest of the company they were also promoting their own." Now, in the present case, ought the directors to be held liable for breach of duty under the circumstances above stated, because they entered into the contract and gave the syndicate time to remedy the defects, and because, notwithstanding the delay in the remedy and pending the remedy, they proceeded with the contract and obtained the conveyance and paid the purchase-money? I think not. Although they did not call the attention of the shareholders to the defects and delay, I see no sufficient evidence to justify me in coming to the conclusion that they did not truly and reasonably believe that what they were doing was for the interest of the company, though they may have been imprudent in some respects. Bearing in mind the knowledge of the property they had, I do not see why they were bound to make further investigations before sealing the contract on behalf of the company, and on this part of the case I may refer to *Overend, Gurney & Co.* v. *Gibb* (2), and the observations of the noble Lords in that appeal, and in considering the conduct of the directors, the position of affairs at that time has to be regarded. Then the price of nitrate was high, and nitrate properties were very valuable and much sought after; and if the company had had perfectly independent directors at that time I cannot help thinking they would have acted in the same way as regards giving time to the vendor to remedy defects, and as regards not sending a circular to the shareholders or convening a meeting to explain the precise position of affairs. Indeed, as to sending a circular or calling a meeting, looking at the matter from a business point of view, I think the shareholders would have been the very last persons to thank their board for doing anything of the kind. In the result, as pointed out, the policy of the directors in giving time did result, though no doubt after a longer period than was originally

(1) [1894] A. C. 660. (2) L. R. 5 H. L. 480.

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Romer J.

contemplated, in the defects being cured; and, subject to the payment of loss accruing by the delay, no damage of any kind has been sustained by the company by reason of any defect in the property as contracted to be sold, or by reason of the action of its directors in adopting and carrying out the contract. And no damage has accrued to the company because the directors did not before their retirement call upon the syndicate to make good the loss occasioned by the delay. The directors in no way released the syndicate from its liability for that loss, and the syndicate is as well able now as heretofore to pay it. How it happened that no formal claim in respect of the loss was made by the directors during their term of office is, I think, clear. The delay extended gradually, and I do not think it ever occurred to the directors while they were in office that any substantial loss had accrued to the company by reason of it. Indeed, that idea does not seem to have occurred even to the present advisers of the company until recently. And if the oversight by the directors in making the claim be negligence on their part, still, seeing its nature, even if damage had ensued from that oversight (which is not the case so far as the facts are established before me), I do not think the negligence was of the kind for which directors can be held liable to action through this company.

With regard to the payment of purchase-money before the defects were cured, though that may have been imprudent, no harm has under the circumstances accrued to the company by reason of it, and I need not further allude to it. In the result the action, so far as it seeks relief against the directors or their representatives, must be dismissed.

I have now to deal with the question of costs—a matter of great importance, especially when I regard the lavish and extravagant way in which, in my opinion, in any point of view, costs have been incurred by the manner in which the company has conducted its case. After consideration I have come to the following conclusion as to the costs. So far as regards the claim against the syndicate, it must pay the company—(1.) the costs of the company so far as increased by the refusal of the syndicate to admit that the company was promoted by the

syndicate and its directors; (2.) the costs of the company in establishing that the property was defective in respect of the half maquina and of the water supply on June 30, 1894, and continued defective as to the half maquina until September 2, 1894, and as to the water until December, 1894; and (3.) such costs as would have been properly incurred by the company up to and including judgment, if it had brought an action limited to recovery of loss and damage arising by reason of the above two defects and the above delay in remedying them. On the other hand, the company must pay to the syndicate all the costs incurred by the syndicate up to and including judgment in resisting the company's action, other than costs incurred in resisting the contention that the syndicate was a promoter, and in resisting the claim of the company in respect of the two above-mentioned defects and the delay in remedying them, and the damage arising from that delay. These must be set off as between the costs so to be paid. The costs of the inquiry I have directed as to loss and damage will be reserved. And there will be liberty to apply in chambers as to those costs and as to payment of the amount of the loss and damage when ascertained.

As between the company and the directors or their representatives, those defendants must pay to the company—(1.) the costs of the company so far as they may have been increased by those defendants not admitting that it was promoted by the syndicate and its directors, and (2.) the costs of the company so far as they may have been increased by those defendants not admitting the above-mentioned two defects and the delay in remedying them. And the company must pay those defendants' costs of action, so far as those costs may have been increased by resisting the company's contention as to its promotion and as to the two defects and delay in remedying them, with set-off.

W. C. D.

C. A.

The plaintiff company appealed from the judgment of Romer J., except so far as it directed an inquiry as to damages sustained by the company by reason of the oficina or maquina

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

not being in complete working order on June 30, 1894. The appeal came on for hearing on April 27, 1899.

Swinfen Eady, Q.C., A. T. Lawrence, Q.C., A. R. Kirby, and *Peterson,* for the company,

Carson, Q.C., Hon. E. C. Macnaghten, Q.C., and *E. Russell Clarke,* for the syndicate and the defendants other than Colonel North's executors, and

Farwell, Q.C., and *O. L. Clare,* for the defendants, Colonel North's executors, used the same arguments as in the Court below.

Swinfen Eady, Q.C., in reply.

Cur. adv. vult.

1899. June 26. LINDLEY M.R. This appeal involves the proper application to a company peculiarly formed, and to a large number of disputed facts, of a few well-settled principles of law which, in their application to this case, appear to me to conflict with each other.

The first principle is that in equity the promoters of a company stand in a fiduciary relation to it, and to those persons whom they induce to become shareholders in it, and cannot in equity bind the company by any contract with themselves without fully and fairly disclosing to the company all material facts which the company ought to know. *Erlanger* v. *New Sombrero Phosphate Co.* (1) is the leading authority in support of this general proposition.

The second principle is that a company when registered is a corporation capable by its directors of binding itself by a contract with themselves as promoters if all material facts are disclosed. *Salomon* v. *Salomon & Co.* (2) is the leading authority for this principle.

The third principle is that the directors of a company acting within their powers, and with reasonable care, and honestly in the interest of the company, are not personally liable for losses which the company may suffer by reason of their mistakes or

(1) 5 Ch. D. 73; 3 App. Cas. 1218. (2) [1897] A. C. 22.

errors in judgment. *Overend, Gurney & Co.* v. *Gibb* (1) is the leading authority on this head.

A fourth principle, not confined to companies, but extending to them, is that a contract can be set aside in equity on proof that one party induced the other to enter into it by misrepresentations of material facts, although such misrepresentations may not have been fraudulent.

A fifth principle is that a voidable contract cannot be rescinded or set aside after the position of the parties has been changed, so that they cannot be restored to their former position. Fraud may exclude the application of this principle, but I know of no other exception. With these preliminary observations I proceed to examine the facts of this case.

The Lagunas Nitrate Company was promoted and formed by the directors of another company called the Lagunas Nitrate Syndicate, in order to buy property belonging to that company. The memorandum and articles of association of the syndicate shew that in promoting and forming the nitrate company the directors of the syndicate were acting within, and not beyond, their powers as such directors. The syndicate therefore, as a company, may be properly described, and ought to be regarded as, the promoter, by their directors, of the nitrate company. The syndicate is therefore responsible for the acts and omissions of its directors in promoting and forming the nitrate company. The directors of the syndicate, and the actual promoters and creators of the nitrate company, were Colonel J. T. North, Robert Harvey, Richard Robertson Lockett, Edward Edmondson, George Fleming, T. Douglas Murray and Maurice Jewell. These seven persons and two others signed the memorandum and articles of association of the nitrate company.

The nitrate company was registered on June 15, 1894. The memorandum and articles of association require attention, for they contain statements of great importance.

The memorandum states that the company has been formed to acquire land and works of the syndicate and its engagements and liabilities with reference thereto, and particularly to

(1) L. R. 5 H. L. 480.

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Lindley M.R.

complete and carry into effect (with such modifications, if any, as may be thought fit) an agreement already prepared and settled for the purchase of such property from the syndicate. Art. 5 required the directors to complete and carry into effect (with such modifications, if any, as they might think fit) the agreement with the syndicate referred to in the memorandum of association. Art. 57 named the seven persons above mentioned as the first directors of the nitrate company, and stated that they were all directors, and the only directors, of the syndicate. In addition to these three articles, it is to be observed that art. 66 enabled the company, by extraordinary resolution, to remove any director; and arts. 82 and 83 conferred upon the directors extensive powers of acting for the company in all matters of business.

Before any prospectus was issued, and before any other person in addition to the nine who had subscribed to the memorandum of association had joined the company, namely, on June 18, 1894, the agreement referred to in the memorandum and articles of association was executed by the syndicate and the company under their respective seals. It is important to consider the effect of this step. By ss. 11 and 16 of the Companies Act, 1862, the memorandum and articles became binding on the company and the members thereof. These sections did not render the nitrate company bound by the agreement referred to in the memorandum and articles of the nitrate company; but those documents clearly authorized the directors to affix the seal of the nitrate company to that agreement with or without modification, and to bind that company to the syndicate by so doing. As soon as that agreement was sealed by the two companies, that which before was no agreement at all became the agreement of both of them.

The decision in *Erlanger* v. *New Sombrero Phosphate Co.* (1), on which the appellants mainly rely, and which is one of the most valuable decisions on the duties of promoters to the companies which they bring into existence, does not warrant the conclusion that the contract between the two companies can be treated as no contract at all, and as a piece of paper not

(1) 3 App. Cas. 1218.

binding the nitrate company either at law or in equity. Nor is it possible after the decision in *Salomon's Case* (1) to treat that contract as so opposed to the Companies Acts as to be ultra vires the nitrate company, or to be void upon the ground that there were not in truth two parties capable of contracting with one another. If the syndicate brought an action against the nitrate company for a breach of the agreement, the nitrate company could not successfully defend itself by a plea of non est factum, or by a mere denial of the existence of any agreement. If the agreement can be set aside, it must be upon some other ground.

The first ground relied upon is the formation of the nitrate company itself without an independent body of directors. Notwithstanding all that has been said in *Erlanger* v. *New Sombrero Phosphate Co.* (2) about the duties of the promoters of a company to furnish it with an independent board of directors, that decision does not require or indeed justify the conclusion that if a company is avowedly formed with a board of directors who are not independent, but who are stated to be the intended vendors, or the agents of the intended vendors, of property to the company, the company can set aside an agreement entered into by them for the purchase of such property simply because they are not an independent board. What vitiated the agreement in *Erlanger's Case* (2) were the concealment of the fact that two out of the three managing directors were agents of the vendors and promoters, and the untrue statement that a provisional contract had been entered into by the directors, whilst, in fact, it had only been framed by the promoters and adopted by three directors, two of whom were not known to be their agents, and the third of whom knew nothing about the matter. In the present case there is no secrecy or concealment of the true position of the first directors, and no untrue statement as to what they did for the company. In the face of the memorandum and articles of association it is impossible to treat the nitrate company or the members thereof as ignorant of the real truth as to the position of its directors.

(1) [1897] A. C. 22. (2) 3 App. Cas. 1218.

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Lindley M.R.

After *Salomon's Case* (1) I think it impossible to hold that it is the duty of the promoters of a company to provide it with an independent board of directors, if the real truth is disclosed to those who are induced by the promoters to join the company. Treating promoters of companies as in a fiduciary relation to them, and as having a power of appointing trustees (namely, directors), I cannot treat companies or their shareholders as so many cestuis que trust under disability, nor even as cestuis que trust for whom trustees are appointed without their consent. No one need join a company unless he likes, and if a person knows that if he becomes a member he will find as directors persons who, in his opinion, ought not to be directors, he should not join the company. If he does, he has no right to redress on the ground that improper persons were appointed trustees. "Volenti non fit injuria" applies in such a case to the members of the company, and *Salomon's Case* (1) shews that the company in its corporate capacity is in this respect in no better position. On these grounds the nitrate company is not, in my opinion, entitled to relief against the syndicate or its directors on the ground that they did wrong in creating the nitrate company with such provisions as are contained in the instruments by which it was created, and which govern its existence. The principles on which *Salomon's Case* (1) was decided by the House of Lords are quite consistent with those on which *Erlanger* v. *New Sombrero Phosphate Co.* (2) was decided, but are quite inconsistent with such an extension of those principles as would be necessary to give the nitrate company relief against those who formed it, on the ground that they formed it with an objectionable constitution. But it by no means follows that the nitrate company has no rights against the syndicate or its directors for misrepresentation or breach of duty as promoters. Notwithstanding the memorandum and articles of association of the nitrate company, that company may have a right to repudiate the contract into which it entered with the syndicate. It is necessary, therefore, to consider the principles on which such right must be rested. The possible grounds for

(1) [1897] A. C. 22. (2) 3 App. Cas. 1218.

impeaching the agreement are: (1.) fraud; (2.) misrepresentation, although not fraudulent; (3.) non-disclosure of material facts. Fraud was distinctly abandoned as a ground of relief, both as against the syndicate and as against the other defendants. But the abandonment of the charge of fraud does not affect the right to relief on the other grounds, if established. Nor can evidence to prove them be rejected simply because the same evidence might be used to support a charge of fraud if made. But the abandonment of the charge of fraud as a ground for relief extends to the whole case, and precludes the nitrate company from seeking relief on the ground of fraud, either in entering into the contract or in not repudiating it. It is important to bear this in mind, because there are cases in which fraud subsequent to a contract may not only afford a defence to an action on it, but may confer a right to have it rescinded: see *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (1), where, after a contract was entered into, fraud was committed by one of the parties by bribing the agent of the other.

Misrepresentation and concealment of material facts remain to be considered. With reference to these it is important to ask to whom any misrepresentation was made, and from whom any material facts were concealed before the agreement was entered into. There is no evidence to shew, nor any reason to believe, that any misrepresentation was made to, or any material fact was concealed from, any person who was a member of the company at that date. The seven promoters of the company and the two other persons who signed the memorandum were then the only members. Three of the promoters were personally acquainted with the Lagunas, and their four associates who were co-directors of the syndicate had learned from them all the material facts relating to the property which they were selling. One of the two remaining signatories of the memorandum and articles of association of the nitrate company was the solicitor both of the syndicate and of the nitrate company, and the other was a brother of one of the seven promoters and secretary of the syndicate. It

(1) (1875) L. R. 10 Ch. 515.

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Lindley M.R.

would be unreasonable to treat them as in any way deceived or misled. They do not allege that they were, and the history of the case fairly leads to the inference that they were not.

If, then, the case stopped here, the decision of the House of Lords in *Salomon's Case* (1) would preclude the company from having the agreement set aside. But in that case care was taken to point out that no other person besides the promoter and his nominees ever became shareholders. No prospectus was issued, and no one else was invited to take, nor did any one else take, any share in the company. Here it was intended from the first to raise a large capital by appealing to the public. The promoters prepared a prospectus before the company was formed, and, although it was not issued until after the company was formed and until after the contract was executed, its issue must, as between the two companies, be treated as the act of the syndicate and of its directors, and not merely as the act of the nitrate company. The nitrate company, although, in one sense, formed when registered, was not completely formed, as contemplated by the promoters, until a prospectus had been issued and a large capital had been subscribed. The issue of the prospectus was the last act of promotion. If, therefore, the prospectus concealed or misrepresented any material facts, the nitrate company would be in position to impeach the agreement, and *Salomon's Case* (1) would be inapplicable. The nitrate company would be in a position to say that there was such a breach of duty on the part of the promoters and directors in misrepresenting and concealing material facts that the contract could not stand in equity. To such a state of things *Erlanger's Case* (2) and *Adam* v. *Newbigging* (3), and the well-known observations of Sir George Jessel M.R. in *In re British Seamless Paper Box Co.* (4), are much more applicable than *Salomon's Case.* (1)

The prospectus must, I think, be read in connection with the recitals in the contract between the two companies. The two together contain the statements which the syndicate and its directors made when they were promoting and forming the

(1) [1897] A. C. 22.
(2) 3 App. Cas. 1218.
(3) 13 App. Cas. 308.
(4) (1881) 17 Ch. D. 467, 471.

nitrate company, and were inducing persons to join it. The most important document is the prospectus. The case is remarkable in one respect. There is no person who has come forward to say that he was misled by the prospectus; but it does not follow that the nitrate company, in its corporate capacity, may not prove a case entitling it to relief. It may prove such concealment of material facts or such misrepresentations as to entitle it to repudiate the contracts unless the defendants can shew that the members of the company knew the real truth, and were not, therefore, imposed upon.

I proceed, therefore, to consider the respects in which the prospectus and the recitals in the contract are alleged to be misleading. The matters complained of relate to: (1.) the land—that is, the ground or mineral to be taken; (2.) the water supply necessary for working it; (3.) the oficina or works, and their state and sufficiency; and (4.) the agreement with W. & J. Lockett.

The evidence bearing on these matters was minutely examined by counsel, and it would be sheer waste of time to examine it again. I will state the conclusions at which I have arrived: (1.) As regards the land or mineral to be taken. The evidence satisfies me that all the 200 acres were not rich in caliche. Some contained little, if any—how much it is extremely difficult to say. Most of the 200 acres are, in my opinion, shewn to have contained a large quantity of rich caliche. They had contained more, but a considerable quantity had been worked out. The prospectus did not contain any positive misrepresentation, but I think it exaggerated the truth.

(2.) As to the water supply. The conclusion at which I have arrived at is that, if there were nothing else to complain of, the prospectus was, in this respect, distinctly and seriously misleading.

[His Lordship then pointed out that it had been established by the evidence that, at the date of the agreement of June 18, 1894, and when the prospectus was issued, the syndicate knew there was an insufficient supply of water for the works from the existing wells, including a new well which had recently been sunk by the syndicate; that by December,

C. A. 1899 — LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. — Lindley M.R.

1894, the syndicate succeeded in getting an adequate supply for the wants of the company, though even now, if the company got only one-third of the total obtained by the syndicate, as provided by the agreement, such one-third might not be sufficient for the wants of the company. His Lordship then proceeded:—]

(3.) As regards the oficina or works. I am not prepared to say that if there had been adequate water supply and an adequate supply of labour, and if the works had been complete and in good working order, they would not have been capable of turning out, if required, the amount of nitrate of soda mentioned in the prospectus. Nor do I think that the mere fact that a few things, however essential, which had been ordered and had not arrived when the prospectus was issued, but which were supplied soon afterwards, afforded any ground for repudiating the contract. Nor do I think the non-existence of an iodine house afforded by itself any ground for repudiating it. Moreover, I am satisfied that many of the outlays made by the nitrate company for buildings and entered in the construction account were not necessary for working the oficina, however desirable in other respects. But, after making all due allowance for these matters and for no little exaggeration, I have come to the conclusion that, looked at fairly, the oficina was not really complete and in such good working order as was represented in the prospectus. The heavy cost of the repairs goes far to shew this.

(4.) As regards the Lockett agreement. It was no doubt both onerous and unusual; but it was distinctly referred to, and I am not prepared to say that the prospectus can be fairly regarded as so misleading by reason of this agreement as to confer on the nitrate company a right to repudiate its contract. But it cannot be cast aside as wholly immaterial.

Another matter, not perhaps itself sufficient to vitiate the contract, but still by no means to be neglected as unimportant, is that the promoters knew that, in order to insure success, the market price of nitrate of soda would have to be kept up by a combination of manufacturers which the nitrate company would have to join. There is nothing in the prospectus to lead the

shareholders to suppose that the company's prospects of success depended on anything of this sort, although of course as business men they must have known that the profitable working of the company depended on the price at which it could sell its nitrate when obtained, and that the market price must depend on supply and demand.

Having regard to what was disclosed and to the avowed object of the company, I do not consider the non-disclosure of the price paid by the syndicate for the Lagunas and of the profit made by the sale to the nitrate company as fatal to the validity of the sale.

But putting together the results arrived at from the evidence and above summarised, I consider it established that the prospectus was seriously misleading, and that the nitrate company had a right to repudiate the contract by reason of the failure of the syndicate to inform it of the real state of things, which was in fact seriously misrepresented, or at least not properly disclosed in the prospectus, although such misrepresentation and non-disclosure were not fraudulent. The directors of the nitrate company no doubt knew all the facts, but they were the persons who failed to disclose them, and who, as directors of the syndicate, formed the nitrate company. To impute to the nitrate company the knowledge which the directors had acquired in another capacity, and which knowledge they did not disclose to any one, is neither law nor sense.

Again, it is true that the prospectus was issued by the nitrate company, and would have to be so treated as between that company and any one except the directors and the syndicate for whom they acted in issuing the prospectus. But the circumstance that the prospectus was issued by the nitrate company could not avail the syndicate who procured the issue of the prospectus by the nitrate company, and thereby completed the promotion and formation of the nitrate company. If the nitrate company had sued the syndicate for a rescission of the contract shortly after it had been entered into, the syndicate would, in my opinion, have had no defence to the action.

It becomes necessary to consider now the position of the

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Lindley M.R.

nitrate company and of the syndicate relatively to each other after the promotion of the former company by the latter was ended. The two companies cannot, in my opinion, be regarded any longer, and as to future acts unconnected with the promotion of the nitrate company, as in any fiduciary relation to each other. They are distinct commercial bodies with the same persons as directors, but they cannot be regarded as two firms with common partners. Still less can the directors of the nitrate company, in transacting its business as its agents, be treated as agents of the syndicate. What the directors do as the agents of the one company cannot be properly treated as done by them for the other. For all business purposes the two boards must be kept distinct. The incorporation of the two companies renders this essential. The obligations of the syndicate towards the nitrate company arising out of its promotion stand, however, on a different footing, and we have to consider whether the nitrate company has lost this right to have the contract set aside, and which right, I have already stated, I am of opinion it had. This right rests, in my judgment, not on the memorandum or articles of association, not on the formation of the nitrate company, but on the issue of the prospectus for which, as between the two companies, the syndicate is responsible. The persons who issued the prospectus, and whose failure to disclose the material facts gave rise to the right to rescind, were the directors of the nitrate company and the agents of the syndicate. Had those same persons any authority to release or discharge the syndicate from the consequences of their own breach of duty? Special authority conferred by the members of the nitrate company there was none. Their authority, if any, to do so must be found in the general authority conferred upon them by the articles of association of the nitrate company. But I cannot construe that general authority as authorizing the directors to screen or absolve themselves and their principals, the syndicate, from the consequences of their own misdeeds. If such misdeeds were fraudulent, there could be no doubt whatever on the point. But, although the issue of the prospectus was not fraudulent, it was seriously misleading, and its issue was a

clear breach of duty on the part of the directors, and it would be contrary to the plainest good sense, and also to well-settled legal principles, to hold that they could, whilst they concealed the facts from the members of the nitrate company, deprive that company of the rights acquired by the concealment of those very facts. In considering, therefore, the position of the nitrate company, I disregard entirely the circumstance that its directors did not rescind the contract whilst they were in office. Mere lapse of time whilst the original directors were in office cannot, in my opinion, avail the syndicate in this action. But it does not follow that all that the nitrate company did by its directors can be disregarded. The real difficulty in the way of rescission turns on the impossibility of restoring the parties to their original position. I have looked carefully into *Erlanger's Case* (1), where this difficulty had also to be considered; but the reports do not shew what was done, except that the property there acquired was more or less worked for a time, and always at a loss. (2) That case, moreover, was one of fraud, and here there is none. In the present case, the nitrate company in fact worked their property vigorously as soon as they could; they called upon the syndicate to make large outlays upon it, and such outlays were made; the company's business was carried on at a profit, and large dividends were declared and paid; the syndicate had sold the shares it received in part payment of the purchase-money; in December, 1895, Porlitz joined the board; an entirely new board was formed in March, 1896; rescission is not thought of, but damages are claimed; the works are carried on as before; the action is commenced in June, and rescission is then thought of for the first time. Even then the works are carried on, not merely to keep the business going, but with a view to profit; and a dividend is declared, though, under counsel's advice, it is not paid. As late as December, 1896, the plaintiffs called for more water from the syndicate. The works have now been stopped altogether. These facts are very different from any with which the Court had to deal with in *Erlanger's Case*. (1) Still, if this were a case of fraud, the Court would be justified in

(1) 3 App. Cas. 1218. (2) 5 Ch. D. 96, 115.

C. A 1899

LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

Lindley M.R.

making an order for repayment of the purchase-money (including the amount realized by the sale of the shares) on the plaintiffs accounting for all their profits. The defendants could not effectually set up their own wrong as a reason for not giving such relief against them. But, there being in this case no fraud, the reasoning which in a case of fraud would justify such an order is inapplicable.

It must never be forgotten that the business of the nitrate company was a highly speculative one. The price of nitrate was liable to great fluctuation; the value of the Lagunas property is not what it was. The original directors of the nitrate company were not fraudulently carrying on its business to screen the syndicate or themselves from the consequences of having issued the prospectus; they did not carry on the business as agents of the syndicate, but simply as agents of the nitrate company; and the nitrate company, first by them and afterwards by their successors, worked the Lagunas with a view to its own profit until the market price of nitrate and of its own shares had permanently fallen. Then, and not before, did the nitrate company determine to rescind, if it could. Having regard to the absence of fraud, and to the impossibility of restoring the parties to their former position, the right to rescind cannot, in my judgment, now be enforced.

Who the shareholders in the two companies now are is not a matter for inquiry; but in considering what is right between two companies, the fact that they consist of individual shareholders ought not to be forgotten; and I cannot see how the Court can now set aside the contract on any terms which would be just between the two companies.

Rescission thus being impossible, and an action for damages on the ground of fraud being out of the question, the only point which remains for consideration is, what pecuniary claim, if any, the nitrate company has either against the syndicate or against its own directors. As regards the syndicate, Romer J. has given the nitrate company damages for the loss sustained by the nitrate company by reason of the short water supply and the incomplete state of the works. This, I think, was quite right. Mr. Swinfen Eady, in his reply, suggested that

the inquiry should be somewhat wider; but the defendants were not heard on this point, which is comparatively of small importance, and no injustice will be done by leaving the inquiry as it is.

I pass to the claim of the nitrate company against the other defendants. It will be convenient to speak of them all as if Colonel North were still alive and were a co-defendant. It must be borne in mind that they were first promoters and then directors of the nitrate company. This circumstance, though not material at law, is material in equity. Their duties as promoters and their failure to discharge those duties has been already considered. As promoters they might be liable to the nitrate company if rescission could be decreed; but they have not by their conduct in the matter of the prospectus become accountable to the nitrate company in respect of any property improperly come to their hands; and actions for damages are governed by legal and not by equitable principles. Their liability to pay damages will be examined presently.

As directors, I am not aware that there is any difference between their legal and their equitable duties. If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company. In this case they clearly acted within their powers: they did nothing ultra vires: fraud is not imputed. The inquiry, therefore, is reduced to want of care and bona fides with a view to the interests of the nitrate company. The amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them: see *Overend, Gurney & Co.* v. *Gibb.* (1) Their negligence must be not the omission to take all possible care; it must be much more blameable than that: it must be in a business sense culpable or gross. I do not know how better to describe it.

(1) L. R. 5 H. L. 480.

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Lindley M.R.

What, then, was their conduct? I regard the burden of proof as now unimportant, for the evidence is sufficiently full and complete to enable the Court to arrive at a satisfactory conclusion. The directors of the nitrate company were also directors of the syndicate. Their position was, or at all events might be, difficult. The interests of the two companies might clash. But the shareholders of the nitrate company knew this perfectly well. Their knowledge did not relieve the directors from the due performance of their duties, but it rendered inapplicable to them many of the remarks made in *Erlanger's Case* (1), where their position was concealed. Their position, though difficult, did not render the due discharge of their duties to either company impossible, and the first question is, Did they succeed in discharging them? If they did not then a second question arises, namely, Is the loss sustained by the company attributable to such failure?

Let us see, then, what they did. First, as promoters, they formed the company. Secondly, as directors, they put the company's seal to the contract and paid the purchase-money. Thirdly, as promoters and directors, they issued the prospectus. Fourthly, they did not communicate all they ought, as promoters, to the shareholders. Fifthly, they did not, as directors, repudiate the contract, but on the contrary held the syndicate to it. Now the cause of loss to the company is not attributable to what they did as promoters in forming the company or issuing a misleading prospectus. The loss to the company was occasioned by what the defendants did as directors, namely, sealing the contract, paying the purchase-money, and going on instead of repudiating the purchase. I take it to be clear that no action at law or in equity could be maintained against the defendants for forming the company with the memorandum and articles of association which were registered. As regards the issue of the prospectus, *Derry* v. *Peek* (2), so far as it goes, would not, I think, protect the directors against an action by the company if the directors issued the prospectus without proper care, and if loss by the company attributable to the

(1) 3 App. Cas. 1213. (2) (1889) 14 App. Cas. 337.

prospectus could be proved; for the directors owed duties to the company which the House of Lords held they did not owe to the plaintiff in *Peek* v. *Derry*. (1)

But, as already stated, the issue of the prospectus by the directors was not in this case the cause of any loss to the nitrate company. Similar observations apply to not consulting the shareholders. Even if the directors had consulted them, it is impossible to say that the loss would not have been sustained. They might have resolved to go on. The omission to consult the shareholders did not cause the loss, and an action for damages for such omission cannot be supported. On this point *Walker* v. *Goe* (2) is important.

But the directors, though not liable for damages, may be liable in equity for misapplying the company's assets. Having acted throughout intra vires and fraud being out of the question, whether a loss of a company's assets by directors imposes on them an equitable liability to make them good depends on the principles already explained. The legal liability for damages for the loss and the equitable liability to make good the loss both depend upon the same considerations, namely, carelessness and inattention to the interests of the nitrate company. This, then, is the last point to be determined.

On this part of the case Romer J., who saw the directors, has found everything in their favour; and I see no reason to differ from him. I go further: I agree in his conclusions. A great point was made of their recklessness in sealing the contract and paying the money without another survey and further inquiry. But bearing in mind that it is plain that Colonel North had had a survey, and that three of the directors knew the property well, they cannot be justly charged with any breach of duty in not waiting for another survey, and in acting on their own knowledge and judgment in this and in other respects. They saw no necessity, in the interest of the nitrate company, for delay, nor for modifying the contract. It is only by imputing to them a want of bona fides as directors that a breach of duty in sealing the contract and paying the purchase-money can be established against them. Their conviction that

(1) (1887) 37 Ch. D. 541. (2) (1859) 4 H. & N. 350.

C. A.
1899
LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.
Lindley M.R.

water was in the district, and could and would be found (as it was, in fact), appears to me to explain their conduct in entering into and not repudiating the contract; and I doubt whether any independent body of directors, with their knowledge of the place and with their conviction as to the water, would have acted differently.

I have not the slightest doubt that the directors believed that, notwithstanding all drawbacks, large profits would be realized by the nitrate company, and that to throw the bargain up would be the reverse of beneficial, not to say disastrous, to its members.

We have not to consider whether Colonel North's estate is liable to account to the company for the secret profits he made out of the Lockett agreement, and I say nothing on that subject. This action is brought for another purpose altogether, and I am of opinion that it is not sustainable.

RIGBY L.J. In the view which I take of this case, it will not be necessary to go at length into the very complicated issues of fact, as to which an immense body of evidence has been taken. I will only say that if it were necessary I should not be inclined to differ from the conclusions of the Master of the Rolls as to the misrepresentations in respect of which he holds the plaintiffs to have been entitled, originally, to a rescission of the contract sought to be rescinded in this action.

In my judgment, however, the undisputed facts are sufficient to enable the Court, on broad and salutary principles of equity, long established and never departed from, to determine the rights of the parties. [His Lordship then stated the circumstances attending the incorporation of the syndicate, the promotion of the company, and the sale to the latter of the 200 estacas, and proceeded:—]

The total of the sums alleged by the syndicate to have been expended by them in respect of the 548 estacas down to the date of the sale of the 200 estacas, including at par the shares which went to make up the original purchase price of 110,000*l.*, fell considerably below 400,000*l.*; but taking it at that sum and

bearing in mind that the syndicate was to retain 348 estacas for its own benefit, it is plain that the profit of the syndicate out of the sale was so considerable that independent advisers of the contemplated company, knowing nothing more than would be told to an independent purchaser, might well have hesitated before recommending the purchase. More than this it is not necessary at present to say, but this at least is clear. It may well be that a contract in similar terms entered into by an independent board of directors would have been binding. Unfortunately, however, the syndicate and its directors took deliberate and effectual steps for shutting out the possibility of the intervention of any independent advisers.

Before the incorporation of the company the board of directors of the syndicate settled the precise terms (*a*) of an agreement for the sale and purchase of 200 of the 548 estacas; (*b*) of the memorandum and articles of association of the projected company; and (*c*) of a prospectus which was to be issued by the company. In the articles of association they had the courage to nominate every member of the syndicate's board, seven in number, to be also a member of the company's board of directors. No other person was nominated as a director of the company, and the seven members so nominated, in their individual capacities and with corresponding boldness, accepted the nomination. They appear to have had no misgiving as to their own competency to perform the delicate task of holding an even balance between the vendor, the syndicate, and the purchaser, the company. Probably their conviction, mistaken as it was, that the company would turn out to be a financial success, made them somewhat indifferent to such considerations. A main part of their scheme seems to have been the exclusion of any possible outside adviser of the company. This was not left to chance. The articles not only provided for the appointment of the seven first directors of the company, but enabled the directors for the time being, at any time and from time to time, to appoint any other person as a director, but so that the total number of directors should not exceed the maximum prescribed number. The directors were, moreover, empowered to fill up any casual vacancy in

C. A. 1899

LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

Rigby L.J.

the office of director by the appointment of a successor who was to hold office for the remainder of the time for which his predecessor in ordinary course would have held office: art. 57. By art. 96 no member is to have any right of inspecting any account, or book, or document of the company, except such as is actually conferred upon him by the statutes, or shall be authorized by the directors or by the company in general meeting. These common form provisions acquire a sinister importance when they complete a scheme of secrecy such as that disclosed by these articles. I may observe, in passing, that in the result it was not until long after the syndicate had been paid the whole cash portion (550,000*l.*) of the purchase price, and had sold at a premium the 300,000*l.* in shares that made up the total sum of 850,000*l.*, that any independent adviser obtained access to the board room of the company. The exact date was December 3, 1895, when Mr. Porlitz first took his seat at the board. [His Lordship then stated the facts of the registration of the company, the publication of the prospectus, and the appointment of the solicitors and secretary of the syndicate as the solicitors and secretary of the company, and proceeded:—]

In short, the company was treated throughout its promotion and down to the time of the execution of the purchase agreement and the issue of the prospectus in precisely the same way as it might have been if intended to be the private company of the syndicate and its board in which they alone were to be concerned.

This, however, was very far from being the case. The draft prospectus shewed from a time before the incorporation of the company that the public were to be invited to subscribe for the two-thirds of the capital, 600,000*l.*, which was not to be issued to the syndicate, and the purchase agreement (clause 18) provided in effect that if the company failed to satisfy the syndicate on or before June 24 that the whole 600,000*l.* offered to the public had been subscribed for in cash and allotted to responsible people, the syndicate might by notice at any time before completion, the end of September, annul the sale.

The case, therefore, is totally different from that dealt with

by the House of Lords in *Salomon* v. *Salomon & Co.* (1), where there was no intention of adding at any time to the original number of corporators, each of whom knew of everything that was being done. There the subscribers to the memorandum and articles and the owner of the business to be transferred only took advantage of the machinery of the Companies Acts for the purpose of carrying on a business in which no other person had or was intended to have an interest. In the present case the syndicate and its directors proposed out of the money of other people to make a great profit to themselves.

I proceed now to consider the exact legal position of the syndicate and its directors with reference to the company.

It is not now disputed that the syndicate in its corporate capacity and the directors individually were promoters of the company. They contested this in the Court below, and had to pay the costs of their unsuccessful contention. It is difficult to see how such a contention came to be put forward. Each of the directors agreed in advance to become a director of the company from its incorporation. Each of them must, in my opinion, be taken to have agreed beforehand to all the terms of the purchase agreement and of the prospectus. Each of them was a signatory to the memorandum and articles. The syndicate is bound by the acts of its directors and is plainly a promoter. The fact, however, of the denial of responsibility as promoters in the Court below is not without great importance. There could be no doubt that the syndicate and each director, both as director of the syndicate and in his individual private capacity, had a distinct and important interest adverse to that of the company. The directors nevertheless chose, while acting as the sole agents for the vendor syndicate, to constitute themselves also and throughout sole agents for the purchasing company.

The syndicate and its directors thus voluntarily placed themselves in a position in which the interest of the directors, both as directors of the syndicate and as to each on his own private account, must necessarily come into conflict with their duty as fiduciary agents for the company. This apparently made them all powerful, but the position, having regard to its

(1) [1897] A. C. 22.

C. A. 1899

LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

Rigby L.J.

consequences, was in reality a most unenviable one, as it left them, most properly, to be judged by a standard which it is next to impossible that any body of men could satisfy. The rules which apply as between independent vendors and independent purchasers have no longer any application, but other rules must apply.

It is an equitable rule, which has always been guarded and enforced with the utmost jealousy, that no fiduciary agent shall, under pain of consequences thoroughly well known and noticed below, intentionally place himself in a position in which his interest may conflict with his duty. This rule was plainly violated in the present case, and I can hardly imagine a case in which the violation could be more flagrant. This violation of the rule was a distinct misfeasance and breach of duty to the company on the part of each promoter, and I see no reason why each should not be liable for all the consequences of the misfeasance and breach. The rule is not a mere arbitrary or technical rule of equity, but is based upon high grounds of morality, and Courts of Equity have always held any departure from it to be a very serious wrongdoing. The equitable rule referred to does not in any way depend upon fraud or any presumption of advantage actually taken; indeed, it applies equally, even though it be shewn that no advantage has been taken. The rule is made general in order to prevent the danger arising from the difficulty of disproving in particular cases that duty has given way to interest: see per Lord Eldon in the leading case of *Ex parte Lacey*. (1)

The plaintiffs in this case are, therefore, under no obligation to allege or prove fraud. Honesty of purpose on the part of the fiduciary agents together with a meaning to act for the benefit of the principal (in this case the company) would not avail them as a defence: see *Ex parte Lacey*. (1) The plaintiffs have not argued the case on the ground of fraud, and have been within their right in declining to do so; and I say at once that we are bound, in this state of things, to assume that all the directors of the syndicate believed the terms of the agreement which they fastened upon the company to be fair, reasonable,

(1) (1802) 6 Ves. 625.

and even advantageous to the company, and that there was an absence of all intention to over-reach. We should also assume that the promoters were ignorant of the fact that they were committing a breach of trust so as to subject themselves to the operation of the equitable rule referred to, otherwise it would be impossible to understand how their conduct could be reconciled with good faith. The doctrine above referred to has been so long and so firmly established that, but for the way in which it has been ignored both in action and in the argument for the defendants, I should have thought it unnecessary to do more than assert it. It may, however, be useful to go once more over well-beaten ground, and I will do so, without, however, attempting to refer to any of the numerous cases which have been decided, except in so far as appears necessary for the full understanding of the doctrine as applicable to the present case.

The case of *Ex parte Lacey* (1) was one of a trustee for sale purchasing for himself. The doctrine has not, however, been confined to trustees for sale. It was long ago extended to the case of a sale to a principal, by a person occupying a fiduciary position, of the agent's own property, as in the present case. So, to an attorney selling an annuity to his client: *Gibson* v. *Jeyes*. (2) In that case Lord Eldon (3) calls it "that great rule of the Court, that he, who bargains in matter of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else."

The rule has been from time to time stated in different language, but whatever hesitation there may have been in the earlier cases, in the later ones no limit whatever has been placed on the principle that no fiduciary agent can bind a principal by a sale of the agent's property, where the principal has not independent advice.

It is unnecessary further to deal with any case except that of promoters.

We find James L.J., in *In re Ambrose Lake Tin and Copper Mining Co.* (4), stating the law applicable to a case like the

(1) 6 Ves. 625.
(2) (1801) 6 Ves. 266.
(3) 6 Ves. 278.
(4) (1880) 14 Ch. D. 390, 394.

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Rigby L.J.

present as follows: "Now what we have got here to consider is a sale in substance made by the vendors for themselves, as beneficially interested, to themselves as directors of the company, being in that sense in a fiduciary character towards the company, and the sale is a sale by themselves in the one character to themselves in the other character. Of course such a sale is a thing that cannot stand, if it is questioned in time, and proper offers made to restore the thing purchased." It is true that in the case cited it was not possible to give the relief asked for, which was relief going upon the ground, not of rescinding, but of upholding the bargain made; but the opinion of the Lord Justice, with reference to such a case as he describes, is in no way affected thereby.

I now come to the case of *Erlanger* v. *New Sombrero Phosphate Co.* (1) It is a case of great importance, not, as I think, because it lays down any new principle whatever, but because of the manner in which it applies well-established principles in the particular case of promoters of a company as between themselves and the company promoted by them. The whole case, as reported before the Court of Appeal and the House of Lords, is worthy of careful attention; but I will cite such passages only from the judgment of the learned judges and the opinions of the noble and learned Lords as seem to me to be of special importance, and to be directly applicable to the present case. The late Master of the Rolls, Sir George Jessel, says (2), with reference to the contract there set up: "It is nothing more than a mere sham contract, a thing entered into by one agent of the promoter to sell, with another agent of the promoter to buy; there really was nothing more in it when it had been adopted than when it was entered into; and it was not a transaction which could in any sense bind the company." By this the learned judge did not mean that the contract was null and void at law, for the judgment recognised its validity at law by directing it to be set aside. James L.J. says (3): "A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come

(1) 5 Ch. D. 73; 3 App. Cas. 1218. (2) 5 Ch. D. 113.
(3) 5 Ch. D. 118.

into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward or agent." Now it is clear that the full and fair disclosure which a trustee would have to make to his cestui que trust to whom he was selling would have to include not only the fact of his being the owner, but all material facts concerning his interest and position, including what it had cost him, or, in other words, the amount of profit that he was to get out of the transaction, and many other things which an independent vendor would be under no sort of obligation to disclose. And the same learned judge says (1): "Therefore, it is not a technical rule at all which requires that a vendor who in any respect is in a fiduciary position should tell the exact truth, should say he is the vendor or state the interest that he has. Therefore, upon that broad principle, I think that this company, ... whenever they discovered the fact, that the full disclosure which the rules of equity require had not been made, were entitled to have the contract set aside." It will be seen that the equitable doctrine is in all these passages laid down in the broadest possible terms without any reference to fraud on the part of the promoters. The noble and learned Lords, whose opinions were given in the House of Lords, said nothing to throw any doubt on the principles enunciated by the learned judges in the Court of Appeal, but on the contrary seem to me to adopt their views to the fullest extent. The first opinion was that of Lord Penzance. He says (2): "Can a contract so obtained be allowed to stand? The bare statement of the facts is, I think, sufficient to condemn it. From that statement I invite your Lordships to draw two conclusions: first, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and, secondly, that this result was brought about by the conduct and contrivance of the vendors themselves. It was the vendors, in their character

(1) 5 Ch. D. 120. (2) 3 App. Cas. 1229.

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Rigby L.J.

of promoters, who had the power and the opportunity of creating and forming the company in such a manner that with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing they used that power and opportunity for the advancement of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were, as it seems to me, bound according to the principles constantly acted upon in the courts of equity, if they wished to make a valid contract of sale to the company, to nominate independent directors and fully disclose the material facts." Lord Cairns says (1): "In the whole of this proceeding up to this time the syndicate, or the house of Erlanger as representing the syndicate, were the promoters of the company, and it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made." There is more in both the opinions quoted from to the same effect, but substantially the passages which I have quoted contain the ground on which the decision of the House as to the voidability of the contract was based. The other noble and learned Lords give their adhesion to these views, but give no additional reasons which seem to me material, being mainly occupied with the important

(1) 3 App. Cas. 1236.

question of delay and acquiescence, on which Lord Cairns expressed grave doubts. I think, however, that it may be well to cite one passage from the opinion of Lord O'Hagan. He says (1): "The promoters, who so forgot their duty to the company they formed, as to give it a directorate without independence of position or vigilance and caution in caring for its interests, must take the consequences. And this without the necessary imputation of evil purpose or conscious fraud. The fiduciary obligation may be violated though there may be no intention to do injustice. If the protection, proper and needful for a person standing at disadvantage in relation to his guardian or his solicitor, or to the promoters of a company, be withheld, the guardian, the solicitor, or the promoters, cannot sustain a contract equitably invalidated by the want of it, merely because it may be impossible to prove that he is impeachable with indirect or improper motives." I think that this passage is entirely in harmony with the opinion of the other noble and learned Lords, and that the decision was not based on fraud, but on breach of duty; even though I consider the case a direct authority for the voidability in equity of the agreement of June 18, 1894, at the pleasure of the company within a reasonable time after the company was made aware of all material facts giving them a right to require rescission. It is said by way of defence that the existence of the fiduciary relation and of the acting in a double capacity is plainly disclosed in the memorandum and articles of association and the prospectus. But this circumstance, though it makes it possible to acquit the promoters of fraud, does not affect the application of the general equitable rule. The rule does not depend upon concealment any more than it does upon fraud or advantage actually taken; and in many cases in which the acting in a double capacity has been perfectly well known, relief has been given. The mere fact of the admission of the fiduciary relation and of the double character in which the fiduciary agents have acted cannot discharge the agents from the obligations of the rule. No doubt a perusal of the memorandum and articles would disclose the fact of the directors of the company being also directors, and

(1) 3 App. Cas. 1256.

C. A. 1899 — LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. — Rigby L.J.

the only directors, of the syndicate, and therefore occupying the ambiguous position which I have already commented upon; but I see no reason whatever why this disclosure should relieve the promoters from the obligations under which they come by reason of their misfeasance and breach of duty. It would be altogether against principle to say that a statement by fiduciary agents of the fact that they have chosen to place themselves in a position which they ought never to have occupied can set them right from the beginning and make them cease to be wrongdoers, or free them from the consequence of their wrongdoing. So much for those shareholders who, whether they saw the memorandum and articles or not, are bound by them, but by nothing else. Take next the case of the shareholders who read the prospectus. Probably ninety-nine out of every hundred persons who read the prospectus were no wiser than the promoters themselves, and would see, in the statement contained as to the identity of the directors of the syndicate with the first directors of the company no ground for questioning the validity of the agreement for purchase and sale.

The promoters, at any rate, cannot be allowed to say, as they have practically done, "We were not aware of any wrongdoing on our part, but you shareholders had notice of facts which ought to have led you to see that we were wrongdoers, and you must be deemed, therefore, to have released us." It is quite clear that mere notice of matters which might well lead to inquiry does not, in this class of cases, take the place of full disclosure, and it is mainly because Lord Cairns differed on this point from the rest of the noble and learned Lords in the *Erlanger Case* (1) that he was disposed to arrive at a different conclusion from them. Even in the case of the very few readers of the prospectus who, from their knowledge of the rule and its applicability to the facts, would be made aware that in theory the rule would be applicable, there would be no ground for assuming, from their taking of shares, a binding assent to a release of the promoters from their obligations. Each of them would be entitled to say, "Here are promoters of high standing and reputation who have not hesitated to put themselves into

(1) 3 App. Cas. 1218.

an ambiguous position, and I must assume them to have satisfied themselves that the bargain which they seek to impose upon the company is so clearly advantageous that there can be no risk of its being called in question." The greater the confidence invited and reposed, the greater the responsibility. But, after all, the obligation of the promoters in respect of the breach of duty of which they were guilty is an obligation, not to individual shareholders, but to the incorporated company. We have no information as to the persons who were the original allottees, and it is quite possible that many of them never saw the prospectus. Even though all saw the prospectus, there can be no doubt that many of them speedily disposed of their shares to others who never read the prospectus, and as to these purchasers from original allottees the whole case would depend upon the memorandum and articles of association. I observe that it was part of the scheme to issue share-warrants to bearer, which would pass by delivery, and the holders of such share-warrants from time to time would not be known.

If the mere notice conveyed by the memorandum and articles to shareholders would suffice to exclude the operation of the equitable rule, there would be an end to it altogether whenever the victim of the scheme was an incorporated company. It seems to me that the case of a company brought into existence by promoters is as strong a case for the application of the rule as can be conceived. With reference to the argument that every applicant for shares has himself only to blame, as he need not have become a shareholder, there appears to me to be a complete answer. In a case between individual fiduciary agents and individual beneficiaries, a purchaser from an original beneficiary, even with notice of what had taken place, would be equally entitled to any remedy which the original beneficiary would have had. This follows from the fact that an equitable interest is in general assignable with all the rights belonging to it. If it were not so, there would, in many of the worst cases in which the beneficiary had by the misconduct of his fiduciary agent been reduced to poverty, be no practical possibility of his obtaining relief. I cannot see why a person taking shares in a company, against which the scheme was planned, should be in

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Rigby L.J.

a different or worse position than an ordinary purchaser of an equitable interest. At any rate, he ought not to be treated as having waived the breach of trust until he knew all material facts.

I shall assume, therefore, that the notice to shareholders of the scheme, so far as they had notice, would not operate to relieve the promoters from the result of what they did. The conclusion which I have arrived at as to the application of the equitable rule involves the following results. Speaking of equity and law for convenience, as the case would have stood before the Judicature Acts, the agreement would have been voidable in equity, but would not be void at law. The rule as to equitable interference was only necessary in order to get rid of some agreement at law (by actual contract or estoppel), and in cases within its operation the agreement at law, so far as it bound the offending party, was kept alive as against him, if it were thought by the beneficiaries more advantageous that the wrongdoers should be bound. In *Ex parte Lacey* (1), for instance, and in numberless cases which have followed it, the subject-matter of the inequitable purchase was set up for sale again on the terms that, if a larger bid were made, the beneficiaries were to have the benefit, but that if no larger sum were bid, the purchaser should be held to his bargain. It is, indeed, one of the just and salutary branches of the rule that the party subjecting himself by his misconduct to the rule cannot make any advantage to himself out of it, but is bound by what he does if it turn out to his disadvantage. In the present case there can be no doubt that if there had been an independent board of directors, their affixing the seal of the company to the purchase agreement of June 18, 1894, would have been an act intra vires, for the very object of the incorporation of the company was that it should enter into the agreement if that were approved by the directors. It would follow, therefore, that the directors who actually caused the seal to be affixed had power at law to do so, and that the agreement was not void at law, but voidable only in equity. A court of equity might not be absolutely bound in every conceivable case to set aside an agreement

(1) 6 Ves. 625.

so obtained, but would be bound to do so if the beneficiary within a proper time brought an action setting up that it was disadvantageous. There would be no need to prove that the sale was at an excessive or undue price. The question of value need never be gone into at all.

In this case, however, it is by no means necessary to press the doctrine to its extreme limit, since it is plain from the result of working that the price fixed was greatly above the real value of the property. It is said that the property was of a highly speculative nature, and no doubt it was; but this did not give to the promoters the right to speculate at the expense of other persons, and the case of the promoters is not improved by the fact (and fact it is) that they carefully secured themselves against any risk except as to shares taken by them, and threw the whole risk upon the company. The syndicate, as I have already pointed out, reserved the power of annulling the agreement of June 18 unless by the 24th of the same month the whole of the shares offered to the public were allotted to responsible applicants. The application for shares far exceeded the number to be allotted. The effect, so far as the syndicate was concerned, was described in a letter by Colonel North, dated July 18, 1894, in which he says: "You have no doubt heard of the successful floating of the Lagunas Nitrate Company. . . . The capital was subscribed considerably more than twice over. The shares of the Lagunas" (that is the syndicate) "have been divided into 5*l.*, and every 100*l.* share is therefore divided in twenty shares, and these 5*l.* shares are now worth 22." No doubt this was eminently satisfactory to the syndicate. But there is another side to the business. The shares of the company were for a time kept at a premium, but by the date of the meeting of July 29, 1896, their 5*l.* shares stood at 2*l.* only in the market. The contrast is instructive: 440*l.* per 100*l.* as to shares in the syndicate, compared with 40*l.* per 100*l.* as to shares in the company.

The rule moreover specially applies where, as in this case, there was no full disclosure of all material facts. What facts the shareholders had notice of may be important when the question whether the right to rescind has been lost is being

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Rigby L.J.

discussed. The directors of the company were appointed, not in order that they might disclose to the company what they knew as directors of the syndicate, but in order that there might be no such disclosure. They were parties to the scheme, and the notice which they had in a different capacity should not be imputed to the company. I cannot, therefore, think that there is any doubt as to the original right of the company to rescind the agreement of June 18 on the ground of misfeasance and breach of duty, quite independently of misrepresentation. The completion of the contract by assignment would not in any way affect this right, since any deeds executed for the purposes of completion would be tainted with the same weakness as the original agreement. If it is suggested that the directors of the company, because they were directors, had the right of rescission in their hands, and that the company is to be fixed with acquiescence and delay from the date of the agreement by reason of their taking no steps to rescind, the answer is that the original breach of duty in putting them in the position of directors was continued and repeated so long as they retained the position of fiduciary managers; and the act of the syndicate in wrongfully placing them there would render voidable not only the agreement itself, but any confirmation of it direct or implied from their delay or want of action whilst occupying the position. Direct confirmation there was none, and it would be absurd to hold that they could do by conduct what they could not do by contract—that is to say, convert against their principals a voidable contract into one not capable of avoidance. They committed themselves before the incorporation to supporting the agreement dictated by the syndicate, and the syndicate, their real principals, in relation to the agreement could have no right to treat them as invested by their improper appointment with the duty of denouncing the agreement which they were appointed to support. The obligation to make a complete and candid disclosure of all material facts existed throughout the whole time during which they had the control of the affairs of the company, and could only have been fulfilled by calling a general meeting and laying before the shareholders at such meeting a full and complete disclosure of

the material facts. This was the last thing that the directors thought of, and their omission to take such a step was a misfeasance and continuing breach of trust as much as their original assumpton of the two positions at one and the same time of vendors and purchasers. So long as they retained the control of the company's affairs, they were, and ought to be, treated as wrongdoers, though, for reasons similar to those already referred to, it is not necessary to say that they acted fraudulently. If full disclosure had been made, the shareholders might have been placed under the obligation of themselves moving in the matter.

But whatever might be the conclusion as to misrepresentations contained in the prospectus, there can, in my judgment, be no possible doubt that it contained no such fair and candid disclosure of material facts as would make it incumbent on the shareholders at once to take prompt steps to obtain rescission. I agree with the Master of the Rolls in his comments on the prospectus, and do not repeat them. I merely take note that such a disclosure would have to, but did not, include a fair statement of material facts under the following among other heads which are not touched by the prospectus, namely: (*a*) The amount of profit made out of the sale by the syndicate. (*b*) The fact that the syndicate (as Mr. Harvey deposes) knew that there could be no working to a profit without a combination of nitrate owners, and no working of the amount of 300,000 quintals monthly with a combination, and that there was no intention or expectation of working at the rate of more than half of the 300,000 quintals per month. In fact, when a combination was formed it restricted the output of its members to 35 per cent. of full working capacity.

The disclosure would also have to, but did not, include full information on the following heads, so imperfectly dealt with by the prospectus and agreement that Romer J. gave directions, against which there is no appeal, for inquiries to ascertain the amount of damages occasioned to the company, that is to say, (*c*) the condition of the maquina at the time of the sale; (*d*) the state of the water supply.

Then comes (*e*) the description of the property sold. The

C. A. 1899

LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

Rigby L.J.

prospectus takes no notice of the fact that a considerable portion of the property had been worked out, and that a further large portion was not capable of being worked at a profit.

Information on all these and other heads of perhaps less importance (as, for instance, the actual terms of the Lockett agreement) ought to have been set forth fully and candidly before the want of independent advice to which the company was entitled could be so far excused or supplied as to put the company (that is to say, the shareholders in general meeting) to their election, whether to take to or repudiate the agreement.

As, however, there was no sufficient disclosure of material facts, the time for applying for a rescission did not run during the period of the domination of what I will call the syndicate directors. Whether this domination should be treated as closing at the first appointment of an independent director, Mr. Porlitz (September 24, 1895), or at the time when he first took his seat (December 3, 1895), or, as I am disposed to think, at the death of Colonel North (May 9, 1896), when the voting power for the first time passed from the syndicate directors, is, I think, immaterial, as a reasonable—which in such a case as the present would be a very considerable—time must be allowed for investigation, obtaining advice, preparing the shareholders, and other matters necessary in the case of a company. Having regard to this, I am of opinion that, whichever date is taken, there was no unwarrantable delay before the commencement of the action on June 12, 1896.

The new directors took prompt measures for summoning a general meeting of the company for, among other things, obtaining the sanction of the company to the continuance of the action. The meeting took place on July 29, 1896. This was the first general meeting at which anything like a disclosure on any of the matters above referred to took place, and the shareholders at that meeting, by an overwhelming majority, passed a resolution approving of the action for rescission, and authorizing the directors to continue. The result of this meeting was that the remaining syndicate directors retired on August 7 or 8, 1896, leaving the new directors to manage the

affairs of the company. After the resolution passed at the meeting, the directors had no power to discontinue the action until they obtained authority from the company: see art. 82, which seems to follow the form as to directors' powers contained in Table A. This circumstance, in my mind, reduces to insignificance what the board are said to have done or proposed to do with reference to the declaration of a dividend of 4 per cent. On the mere question of delay, therefore, I can see no ground whatever for saying that the right to rescission has been lost.

A further question, however, arises: whether the company is precluded from demanding rescission by alteration of the state of the property—that is to say, the removal, manufacture and sale of the manufactured proceeds of large quantities of the nitrate contained in the form of caliche in the purchased grounds.

I will first deal with the facts so far as seems necessary, and then consider the law applicable to them. The syndicate directors (and by reason of their acts the syndicate itself, whose nominees they were) were alone and directly responsible for the removal of all caliche removed during the period of their domination. With a view also to having an effectual three months' trial for the purposes of a combination of nitrate owners thought necessary, they stopped the working of the oficina for the months of January, February, and March of the year 1896, and at considerable expense accumulated stock for the purposes of the trial in April, May, and June of the same year. The trial was nearly half-way through at the death of Colonel North, and no one I suppose would suggest that it was the duty of the new directors, who, by that event, obtained a majority on the board, to put a stop to the working at high pressure arranged for the rest of the period of trial. For all the working of the caliche grounds down to the end of June, 1896, the syndicate directors were therefore directly responsible.

Now, it was shewn by counsel for the principal defendants that the amount of the working, down to the end of June, 1896, was approximately three-fourths of the whole working from the

C. A. 1899 — LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. — Rigby L.J.

end of June, 1894, down to the end of 1897, the company under its new board being shewn to be responsible for one-fourth only of the whole. The amounts of caliche taken in different months varied considerably; but the figures provided us by Mr. Carson shew on a rough average that during a period of two years, when the workings were under the control of, or arose directly from the dispositions made by, the syndicate directors, the monthly takings of caliche were more than twice the monthly average during about eighteen months when the new board were in power.

Now, no doubt it is a general rule that in order to entitle beneficiaries to rescind a voidable contract of purchase against the vendor, they must be in a position to offer back the subject-matter of the contract. But this rule has no application to the case of the subject-matter having been reduced by the mere fault of the vendors themselves; and the rule itself is, in equity, modified by another rule, that where compensation can be made for any deterioration of the property, such deterioration shall be no bar to rescission, but only a ground for compensation. I adopt the reasoning in *Erlanger's Case* (1) of Lord Blackburn as to allowances for depreciation and permanent improvement. The noble Lord, after pointing out that a court of law had no machinery for taking accounts or estimating compensation, says: "But a court of equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowances for deterioration. And I think the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract." This important passage is, in my judgment, fully supported by the allowance for deterioration and permanent improvements made by Lord Eldon and other great equity judges in similar cases. Lord Blackburn, after some observations on the duty of parties seeking relief to exercise due diligence, cites a passage from a judgment of the Judicial Committee in *Lindsay Petroleum Co.* v. *Hurd* (2) (a

(1) 3 App. Cas. 1278. (2) (1874) L. R. 5 P. C. 239.

passage which has often been referred to as giving the best general rule applicable in such cases as the present), and part of which I quote, to the following effect: "The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases, lapse of time and delay are most material."

The obligation of the vendors to take back the property in a deteriorated condition is not imposed by way of punishment for wrongdoing, whether fraudulent or not, but because on equitable principles it is thought more fair that they should be compelled to accept compensation than that they should go off with the full profit of their wrongdoing. Properly speaking, it is not now in the discretion of the Court to say whether compensation ought to be taken or not. If substantially compensation can be made, rescission with compensation is ex debito justitiæ.

Applying the principles to the present case, and first with regard to the working down to the end of June, 1896, I ask, What is practically just, and whether the purchasing company has, by its conduct and neglect, put the other party in a situation in which it would not be reasonable to place him if rescission were afterwards to be asserted? In my judgment, there is no trace of conduct or neglect of the kind referred to. On the contrary, the position of the promoters was voluntarily assumed by them as part of their original scheme, and they were maintained in that position by a continuing breach of trust in keeping back from the company what they ought to have disclosed.

What, then, does practical justice require? Not, certainly, that the promoter syndicate shall keep intact the whole of the enormous sum of 874,000*l.* which they have received, leaving their beneficiaries, in return for the payments made, a property

C. A. 1899

LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.

Rigby L.J.

of a value immensely below that sum. All that practical justice requires is that they should be treated as having worked the property for themselves, and should have full accounts of all profit made out of the working down, at any rate to the end of June, 1896. This, as I have already pointed out, applies to fully three-fourths of the whole working.

There remains the case of the one-fourth worked by the new board during the pendency of the action. Here, again, it is of some importance to bear in mind that after the resolution of the meeting of July 29, 1896, the board could not properly put an end to the pending action without getting the authority of the company in general meeting to do so. They never applied for this, and there has been no wavering on the part of the company, whether the directors did or did not appreciate their position fully.

The notice of July 28 was discussed at the meeting of the 29th, and Mr. Harvey, one of the syndicate directors, who took the main part in defending the proceedings of himself and the other syndicate directors, shewed that he clearly understood that if the action were successful the profits of the working were to be for the syndicate. It would be going too far, perhaps, to treat these remarks as a serious acceptance of the terms of the notice in the alternative of the syndicate failing in the action. Yet I do not find that either from Mr. Harvey or from any other source there was any questioning on the part of the syndicate of the assumption made in the recital to the notice that it was necessary in the interests of all parties to the action that the undertaking should be maintained as a going concern. Both at the meeting, and throughout the proceedings in the action, the defence of the syndicate and of the promoters was an absolute denial of the company's case. The questions whether the syndicate or its directors were promoters, or held any other fiduciary position, and whether there had been any breach of trust, were put in issue and strenuously contested; and thereby the proceedings in the action were delayed, and the continued working occasioned, for, if these points had been admitted in the action, it need have taken very little time. I think that the promoters have thus been respon-

sible for the working as truly, though not as directly, as they were for their own working, and ought not now to be allowed to fall back upon it in answer to a claim for rescission.

The following additional considerations support that conclusion. The working was not a departure from, but only a carrying out of, the original scheme, which involved the working of the caliche by the original board in the first place, and, when they found it convenient to retire, by their successors in office. The working out of another fourth, in addition to the three-fourths worked down to June 30, 1896, did not so materially alter the position of things at the commencement of the action as to bar the plaintiffs' claim to rescission. It was the fault of the promoters, and their fault only, that the company were placed in the very difficult position in which they found themselves. They could not prudently leave the works derelict. They could not dismiss the workmen who had been collected, and allow them to disperse, and the only alternative was to keep the works going. The syndicate directors had expended apparently (I do not know that this is fully made out) the whole working capital of 50,000*l.*, so that the new board could not be expected to accumulate the manufactured nitrate, and were practically obliged to sell it for what it would bring in the market. They could not foresee that the action would be pending for so long a period as it actually took before judgment was obtained.

I think that the course taken was one which might be properly taken, having regard to the interests of all parties, without involving any loss of rights. If there had been any reckless or excessive working, other considerations might arise; but, as I have already pointed out, the average rate of production and sale during the management of the new board was less than one-half of the average rate for which the syndicate were responsible.

Under these circumstances, so far from holding that the company were bound to discontinue working and selling nitrate, I think they were practically bound to continue it for the best commercial advantage they might be able to obtain, and, in my judgment, the following words of Lord Selborne in *Erlanger's*

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE Rigby L.J.

Case (1) are fairly applicable: "That the company should, until a settlement was arrived at (or a decree made in case of litigation) continue in possession, and keep the concern going, in a due course of management, was an inevitable necessity under the circumstances. A different course (since the vendors did not offer to take back the property) would have given the vendors much more reason to complain of the conduct of the plaintiffs (so far, at least, as my opinion is concerned) than they now have."

In the present case there is nothing approaching the difficulty in making equitable allowances that existed in *Erlanger's Case*. (2) Profits have been made which the promoters can have the benefit of. In *Erlanger's Case* (2) the operations of the purchasing company had only produced loss, yet the promoters were obliged to take back the property in its greatly deteriorated condition, with an inquiry as to profits (if any) which seems to have been of no value. In *Erlanger's Case* (2), by the want of knowledge of the company's agents, a comparatively valueless mineral (carbonate) had been mistakenly sold for, or mixed with, the valuable phosphate, so as greatly to injure the value of the article sold and lower the reputation of the island deposits.

Here the somewhat feeble attempts which were made to impugn the conduct of the business during the action have, in my judgment, failed.

Here, again, the promoters have spent large sums out of the company's funds on property which turns out to have been all along in equity their own, and if they get back their property it must be improved to a considerable extent by this expenditure, though it has been deteriorated by the withdrawal of caliche.

If the promoters could establish a claim for deterioration beyond the amount of profits made, they would have to submit to a possible counter-claim for improvements made at the expense of the company.

In my opinion there ought to be judgment for the plaintiffs for rescission of the agreement of June 18, 1894, and orders for

(1) 3 App. Cas. 1261–2. (2) 3 App. Cas. 1218.

repayment of the cash portion of the purchase-money, with interest at 4 per cent. from the date or respective dates of payment, and for the sums produced by selling the 300,000*l.* in shares, with interest from the date or respective dates of receipt of the purchase-money for the shares. Then there should be inquiries as to the amount of profits made by the company from the sale of nitrate, and directions as to bringing the amount into account.

Perhaps it would be sufficient to stop here with a direction that the company should be entitled to a lien upon the property for the amount due to them. But, if either side insisted upon it on sufficient grounds, there might be cross inquiries as to deterioration of the property otherwise than by the extraction of caliche, and as to the amount of expenditure of capital moneys of the company in lasting improvements, with an order for payment of the balance to the company or the syndicate, as the case might require. As the inquiries might occupy some very considerable time, provision should be made for payment into court at once of so much of the money as would in all probability be in excess of anything that could be due to the company, as in *Dunne* v. *English*. (1) The order for payment by the syndicate should be extended also to the defendant directors and the personal representatives of deceased directors, and the liability should be made joint and several.

Although my judgment is opposed to those of my learned brethren, I have sketched out the general frame of an order to shew what, in my opinion, the justice of the case requires. But even though it had prevailed, it would, I think, have been impossible to frame an order correct in all its details without having the parties and hearing them on the minuter points of difference between them.

In conclusion, I would say that I have found it difficult to state the case without appearing to raise against the promoters a presumption of misconduct amounting to fraud. But the Lord Chancellor's observations in *Adam* v. *Newbigging* (2) are applicable here. My explanation of the conduct of the promoters is—that they were so confident of the company

(1) L. R. 18 Eq. 524. (2) 13 App. Cas. 313, 314.

C. A. 1899 LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. Rigby L.J.

being a success as to be negligent with reference both to the prospectus and the agreement, feeling sure that no objection would ever be taken. The directors of the syndicate supposed themselves to know everything about nitrate, and to be able to insure success to the company. They turned out to be no more infallible than many over-sanguine promoters who have preceded them. Their calculations failed, and they ought to bear the consequences of such failure, since they had no right to speculate at the risk, not of themselves, but of the beneficiaries.

COLLINS L.J. Fraud is not alleged or imputed in this case. The directors were under no legal incapacity to seal the contract of purchase by the company. The company came into existence for the purpose of taking over the property from the syndicate at a price already determined, and by one of its articles (57) the directors of the syndicate were constituted directors of the company, and, by art. 5, they were charged with the duty of completing and carrying into effect the agreement with such modifications (if any) as they should think fit. *Salomon's Case* (1) is a clear authority that such an arrangement is not void or illegal. There is not here, any more than there was in that case, any representation, express or implied, as there was in *Erlanger's Case* (2), that the board is independent. On the contrary, the true facts appear in the articles, and are stated in the prospectus. Therefore, no claim to relief can be based on the fact per se that the directors were not independent. Although not independent, they are legally appointed directors, and are entitled to act as such. But, so far as a discretion is confided to them by the constitution of the company, they are bound to exercise it honestly and with reasonable care.

These principles applied to the facts of this case will, I think, decide both the question of rescission as against the syndicate and the personal liability of the directors to the plaintiff company.

I agree entirely with the conclusions of fact drawn by

(1) [1897] A. C. 22. (2) 3 App. Cas. 1218.

Romer J. in this case. When the most important issue is one closely akin to one of bona fides, great weight is naturally given to the opinion of the judge who has himself seen the witnesses whose conduct is impugned; but even without this advantage, after the full examination to which the evidence has been subjected before us, I should unhesitatingly myself have arrived at the same conclusions. To the extent, therefore, to which he has found them, and no further, I agree that there were matters in respect of which the property contracted to be sold did not fully answer its description.

The first question is, whether, by reason of these defects, the plaintiff company can claim rescission of the contract. I am clearly of opinion that they cannot. The plaintiffs have been in possession of and working the property sold from June 30, 1894, until after the hearing before Romer J. in 1898. The writ in this action was issued in June, 1896. Without considering for the moment what has been done by the plaintiffs since a change in the constitution of the board gave the dissatisfied shareholders a majority, it is clear that before that date the defects in question were remedied at considerable expense by the syndicate at the instance of the plaintiff company represented by its properly constituted board. Even assuming that the directors of the plaintiff company might have thrown up the contract on discovery of these defects, the result is that the syndicate, which is itself a limited company, and as such constitutes a different entity and embraces members other than the common directors, has expended large sums of money in making good the defects, and cannot be restored to the position in which it would have been had the property been then thrown back on its hands.

Under such circumstances I think it is clear that rescission could not have been claimed had the two boards been independent. How far are the rights of the parties affected by the fact that the boards were not independent? Though not independent they are the persons charged, as a term of the plaintiff company's existence, with the duty of carrying out the contract between the two parties. It seems to me to follow from the fact that both are properly constituted companies and

C. A.
1899
LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE.
Collins L.J.

that fraud is excluded, that they are bound inter se by the acts intra vires of their respective boards, and that the syndicate is, therefore, not debarred from insisting on its rights to restitutio in integrum because the directors of the company promoted by it are not independent. It is said that in the circumstances they could not act without laying the facts before the shareholders, even though they might honestly and reasonably believe that it would not be for the best interest of the shareholders to do so. But to hold that a discretion, however honestly and carefully exercised by its directors in the interest of the plaintiff company, could confer no rights on the syndicate who had changed their position in consequence, would be to withhold from the directors of the plaintiff company the powers conferred upon them as a term of its constitution, and I cannot think that such a limitation is to be implied where their dual capacity is avowed and underlies the scheme to which every member of the company has assented. In addition to this, it seems to me that the acts done by the plaintiff company since the dissatisfied shareholders became aware of the actual facts have been far in excess of anything that has in any reported case been held not to be inconsistent with a right to rescission. There was no "inevitable necessity" as it seems to me, such as was stated by Lord Selborne to exist in *Erlanger's Case* (1), obliging them to continue to work and exhaust the property as they have done in getting out and disposing of such large quantities of nitrate at the low prices then prevailing. This seems to me a very different thing from merely "keeping the concern going," which is all Lord Selborne refers to; and I agree with the observations which Romer J. has made on this part of the case.

In my judgment the water difficulty has been greatly exaggerated by the plaintiffs. I think the defendants had in fact found a sufficient source of water for all possible needs of the oficina, and had connected it therewith by an adequate system of pipes with the necessary pumps; and I think the failure and intermittent character of the supply after June 30

(1) 3 App. Cas. 1218.

was largly due to temporary causes and to bad management of the pumps and wells; and though a large sum was spent by the syndicate in remedying it, I think the greater part of this expense might have been saved had the management been more skilful. It is a remarkable fact that this ground of complaint was not even mentioned in the report of the dissentient directors, and first took shape after the case had got into the hands of counsel. The defect, such as it is, was capable of certain remedy and was, in fact, completely remedied; and even if it formed an adequate ground of rescission, I do not think it created such an emergency as the directors were debarred from dealing with on their own responsibility without taking counsel with the shareholders. The like observation applies still more strongly to the case of the maquina.

For the reasons I have already given, I think there was no incapacity in the directors, by reason of their dual relation, to guide their conduct by the plain rules of common sense as business men managing a commercial undertaking; and I think, when the right of such companies to exist and carry out the purpose of their creation, according to the conditions of their constitution, is admitted, it would be unwise to lay down a standard of duty which would make it a practical impossibility to manage the undertaking upon ordinary business lines. The fact that there are conflicting interests is, of course, a most important factor in forming a judgment whether they acted honestly and with due care in any given case; but it does not destroy their power of acting on their own responsibility without consulting the shareholders, or make their acts voidable at the instance of the company.

It being impossible, therefore, to grant rescission against the syndicate, it remains to consider the question of the liability of the directors.

Applying the principles above stated, we have to deal with a company legally constituted, with a board who by the articles can bind the company by acts done within their powers although they are not independent. These are the directors by whose acts the company and every member thereof have

C. A. 1899 — LAGUNAS NITRATE COMPANY v. LAGUNAS SYNDICATE. — Collins L.J.

agreed to be bound. It seems to me that such directors were fixed with the duty of exercising their discretion within the defined limits honestly and with reasonable care when they sealed the contract. It is said they ought to have made further investigations before doing so. I think the true question is, "Having regard to their knowledge and information, did they act fairly and with reasonable care in not making further investigations?" Dishonesty, as I have said, is not suggested, and I am satisfied that they did reasonably believe they had quite sufficient information to justify them in the interest of the plaintiff company in sealing the contract.

But it is said, "Having signed the contract, they ought to have rescinded it as soon as they learnt the facts as to the water and the maquina." Here, again, I think their conduct is to be tried by the same standard, and the question to be answered is, Did they honestly, and exercising reasonable care, come to the conclusion that it would be wise in the interest of the company to hold to the contract and insist upon the representations being made good?

I cannot doubt that they thought, and had good grounds for thinking, that they were acting in the best interests of the company in doing as they did. I do not refer to the facts, which are fully stated on this part of the case by Romer J., with whose observations upon them I entirely agree. I think also that, even if there was a breach of duty on their part in not consulting the shareholders, Mr. Farwell was right in contending that no damages, other than nominal, could be recovered. As regards the other points raised on the appeal, I desire to adopt the conclusions and reasons of Romer J., in whose opinion on the whole case I thoroughly concur.

Appeal dismissed with costs.

Solicitors: *Slaughter & May; Budd, Johnsons & Jecks; Blunt & Co.*

G. I. F. C.

BEW *v.* BEW.

C.A.
1899
July 29;
Aug. 2.

[1898 B. 27.]

Practice—Costs—Appeal as to—Trustee—"Costs, Charges and Expenses"—Discretion of Judge—Leave to Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1.

Where costs are in the discretion of the judge, the Court of Appeal will assume that he has exercised his discretion as to them and will not entertain an appeal, unless it is satisfied that he has not exercised his discretion but has applied some rule which he considered as excluding it.

The City of Manchester, (1880) 5 P. D. 221, followed.

Charles v. *Jones*, (1886) 33 Ch. D. 80, not followed.

An appeal from an order for payment of "costs, charges and expenses" will not lie as to "costs" only, if the order is right as to "charges and expenses."

Charles v. *Jones*, 33 Ch. D. 80, followed on this point.

In re Chennell, (1878) 8 Ch. D. 492, not followed.

THIS was an action by a husband against his wife to establish as against her a trust in his favour of a sum of 300*l.* The plaintiff alleged that in September, 1897, he being engaged to be married to the defendant, then Fanny Walker, widow, he lent her the sum of 300*l.* to be advanced, together with a sum of 300*l.* of his own, to a friend of his named Moss, on mortgage of certain freehold premises belonging to Moss; and that it was arranged that the mortgage for the whole 600*l.* should be taken in the name of the defendant alone, which was accordingly done by a mortgage dated September 6, 1897. The parties married a few days after the mortgage, but separated after a short period. In December, 1897, the defendant called in and received payment of the whole mortgage debt of 600*l.*, but refused to pay 300*l.* of it to the plaintiff, alleging that the 300*l.* was a gift made by him as an intended provision for her prior to the marriage. The plaintiff then brought this action claiming a declaration that the defendant was a trustee of the moneys secured by the mortgage, as to 300*l.* part thereof, and interest thereon, for the plaintiff; and alternatively, that 300*l.*, part of the moneys

C. A. 1899 BEW v. BEW.

secured by the mortgage, was money lent by him to the defendant for the purposes of such mortgage. Under an order made in the action by Stirling J., 300*l.* was paid into court by the defendant.

During the progress of the action the defendant died, and the action was revived against her executors.

The trial took place on December 8, 1898, before Kekewich J., who made a declaration that the late defendant, the wife, had been trustee for the plaintiff of the 300*l.* in question, with interest, and he directed taxation of "the costs of the defendants of this action, including the costs, charges and expenses of the late defendant Fanny Bew as trustee as between solicitor and client." Then the payment schedule directed that such costs, and costs, charges and expenses, when so taxed, should be raised and paid out of the fund in court, and that the residue of the fund should be paid out to the plaintiff. In giving judgment the learned judge said that the plaintiff had been careless in advancing the money, and that he did not see his way to depriving the wife (and consequently her estate) of her costs, charges and expenses as trustee, though she had denied the trusts.

It was said that the defendants' costs and the trustees' costs, charges and expenses would nearly exhaust the fund.

The plaintiff appealed from so much of the judgment "as directed that the defendants were entitled as trustees to their costs of the action as between solicitor and client, including therein any costs, charges and expenses properly incurred by them as such trustees beyond the costs of the action, out of the money paid into court," and asked that the defendants might be ordered to pay the plaintiff the costs of the action and of the appeal.

No leave to appeal had been given.

The appeal was heard on July 29, 1899.

Warrington, Q.C., and *Buckmaster*, for the plaintiff. The question is as to the effect of s. 49 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), and Order LXV., r. 1, of the Rules of the Supreme Court, 1883. Sect. 49 says that, "No order made by

the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order." Order LXV., r. 1, says that, "Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge; provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

Now here the learned judge has not exercised his discretion at all, but has acted upon a supposed rule that a trustee is entitled to his costs notwithstanding his denial of the trust. He has put the costs of the action upon the same footing as the costs, charges and expenses, as between solicitor and client, of a trustee. An order for payment of "costs, charges and expenses" is appealable, and as they are included in the costs of the action, the whole order is appealable, not being simply an order as to costs: *In re Chennell* (1), where the order was in the same form as the present. That case was followed in *In re Beddoe*. (2)

Even if we are wrong on that point, and supposing the order is to be regarded simply as an order for payment of costs, it is still appealable because the learned judge has not exercised his discretion. He supposed that the rule applied to an action to establish the trust, which is very different from an action to ascertain the amount of the trust fund. As he therefore did not exercise his discretion, but acted upon a supposed rule of law, the order as to costs is appealable: *Cockle* v. *Treacy* (3), following *The City of Manchester*. (4)

[They were stopped by the Court.]

P. O. Lawrence, Q.C., and *Stewart-Smith*, for the defendants.

(1) 8 Ch. D. 492, 500, 508.
(2) [1893] 1 Ch. 547, 555.
(3) [1896] 2 I. R. 267, 271.
(4) 5 P. D. 221, 222.

C. A. 1899 BEW v. BEW.

We take the preliminary objection that this order is not appealable. The learned judge has exercised his discretion as to costs, and having done so, no appeal will lie: *Charles* v. *Jones*. (1) He intended to give the wife the full costs, because the husband had been careless in the way he had created the trust. The case comes precisely within s. 49 of the Judicature Act, 1873, and no leave to appeal has been given as required by the section.

Warrington, Q.C., in reply. *Charles* v. *Jones* (1) does not apply, for this appeal is not as to costs, which are in the discretion of the judge, but as to costs, charges and expenses, which are not in his discretion. It is not a case falling within Order LXV., r. 1, at all.

[LINDLEY M.R. How do you get out of s. 49?]

By *In re Chennell*. (2) *Charles* v. *Jones* (1) is criticised in *In re Beddoe*. (3) The passage in Cotton L.J.'s judgment in *Charles* v. *Jones* (4)—to the effect that even if the judge did not exercise his discretion, if it is a case in which the Judicature Act leaves the costs to the discretion of the judge, it takes away the power of this Court to entertain an appeal from his decision—goes too far, and is a mere dictum; it is moreover inconsistent with *The City of Manchester* (5), which was not called to the attention of the Court.

Charles v. *Jones* (1) only applies to cases which come within Order LXV., r. 1. No one ever heard of a defendant unsuccessfully disputing the plaintiff's title being entitled to his costs. The order here is wrong even as to "costs, charges and expenses," for they ought to have been limited to the trust fund of 300*l*.

[LINDLEY M.R. Mr. Lawrence, how do you explain the conflict between *The City of Manchester* (5) and *Charles* v. *Jones*? (1)]

P. O. Lawrence, Q.C. I cannot deny that the two cases are conflicting, but I rely on the statement at the beginning of your Lordship's judgment in *Charles* v. *Jones* (1), that by virtue of

(1) 33 Ch. D. 80, 81–2.
(2) 8 Ch. D. 492.
(3) [1893] 1 Ch. 547.
(4) 33 Ch. D. 82.
(5) 5 P. D. 221, 222.

s. 49 "no appeal at all lies for costs which are within the discretion of a judge"; and I ask the Court to follow that case and the plain words of the Act.

Cur. adv. vult.

Aug. 2. LINDLEY M.R. We have taken time to consider our judgment in this appeal, and have consulted our colleagues in the other branch of the Appeal Court in order that there may be no doubt on the point in the future.

The difficulty arises in this way. Sect. 49 of the Judicature Act, 1873, runs thus: "No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order." Now that section has been construed in two ways which are inconsistent with each other. The first case in which it came before the Court was *The City of Manchester* (1), decided in 1880. The question there was whether an order giving the plaintiffs their costs of the action in a case of collision, where both vessels were to blame, was right. The objection was that it was an appeal as to costs only; and the Court took the view thus expressed by James L.J. (2): "Where costs are given with regard to the conduct of the parties there is no appeal; but where a general rule is laid down and costs given according to it an appeal will lie." That is further expounded in the judgments, and the case lays down this rule: though the costs may be in the discretion of the Court, yet, if it appears that this discretion was not exercised, but the judge applied a rule instead of and excluding his discretion, it is still appealable without leave; and, when the language of s. 49 is looked at, there is a good deal to be said for that view, the object of the section being that the Court of Appeal should not review the judge's discretion. The case which conflicts with it is *Charles* v. *Jones*. (3) There *The City of Manchester* (1) was not cited, and the view expressed by Cotton L.J. (4) is this: Even if the judge did

(1) 5 P. D. 221.
(2) Ibid. 222.
(3) 33 Ch. D. 80, 81-2.
(4) Ibid. 82.

C. A. 1899 BEW v. BEW. Lindley M.R.

not exercise his discretion, "if it is a case in which the Act leaves the costs to the discretion of the judge, it takes away the power of this Court to entertain an appeal from his decision." If *The City of Manchester* (1) had been before the Court the learned Lord Justice would probably not have expressed himself in quite those terms. It is obvious that the two views cannot stand together: and the conclusion at which we have arrived at is that the interpretation put upon the section in *The City of Manchester* (1) is the correct one; that is, that if the costs are in the discretion of the judge the Court of Appeal will assume that the judge exercised his discretion, unless it is satisfied that he has not exercised his discretion, but has applied some rule which in fact excluded his discretion.

There is one other point. There is a discrepancy between *Charles* v. *Jones* (2) and *In re Chennell* (3), decided in 1878. In *In re Chennell* (3) Sir George Jessel M.R. laid down that an appeal without leave would lie as to costs, charges and expenses; and that if the three things were included together in the order an appeal would lie as to the costs only without reference to the question whether there was anything else in the order which is appealed from. That is inconsistent with *Charles* v. *Jones* (2), and on that point we think *Charles* v. *Jones* (2) ought to be followed. You cannot obtain a right to appeal as to costs by invoking in aid another part of the order with which there is no complaint. On this point we adopt the view of Cotton L.J., that is, you cannot appeal as to costs only if there is nothing wrong with the order as to charges and expenses.

Now, what is the present case? It is a contest as to the ownership of 300*l.*, part of 600*l.* invested in mortgage in the name of the plaintiff's late wife. The action was by the husband against his wife to assert his right to the 300*l.*

The wife's defence was a claim by her that the 300*l.* was her own property, and a denial that she was a trustee of it for her husband. Obviously in such a case the costs ought to follow

(1) 5 P. D. 221. (2) 33 Ch. D. 80, 81–2.
(3) 8 Ch. D. 492.

the event. But the learned judge decided in favour of the husband on the merits, and yet has ordered the whole of the wife's costs to come out of the fund. It is said that he did that in the exercise of his discretion; but from the very imperfect note of his judgment which has been read to us it appears that the judge looked on this as a trust fund, and has not exercised his discretion, but has applied a rule applicable to trustees, and which, if applicable, excluded the exercise of his discretion. The learned judge not having exercised it, the appeal can be heard on the merits, and his decision must be reversed, and the defendant must pay the costs.

The judgment will be varied as follows:—

The declaration that the late Fanny Bew was a trustee for the plaintiff of the 300*l.* will stand. Discharge the subsequent part of the judgment as to costs, and the payment schedule, and in lieu thereof order the defendants to pay the plaintiff's costs of this action, such costs to be taxed; and the defendants alleging that the late defendant Fanny Bew incurred, as trustee of the 300*l.*, certain costs, charges and expenses (not being costs of this action) which were properly payable out of the 300*l.*, or the funds representing the same, refer it to the taxing master to tax such costs, charges and expenses (if any); and pay such costs, charges and expenses (if any) out of the fund in Court. Transfer or pay the balance of such fund to the plaintiff. Liberty to apply.

SIR F. H. JEUNE and ROMER L.J. concurred.

Solicitors: *M. A. Orgill, for Empson Alcock, Burslem; H. Mear, for E. Hollinshead, Tunstall.*

G. I. F. C.

C. A.
1899
Aug. 2, 3.

SANTLEY *v.* WILDE.

[1897 S. 4429.]

Mortgage—Collateral Advantage—Clog on Redemption—Presumption of Pressure on Mortgagor.

A mortgagee may stipulate in his mortgage deed for a collateral advantage for himself beyond the repayment of the sum advanced and interest, and may enforce the bargain against his mortgagor, provided it is not unconscionable or oppressive; and there is no presumption, in the absence of evidence to the contrary, that the collateral advantage was given by the mortgagor under pressure.

A "clog" or "fetter" on a mortgagor's equity of redemption, explained.

Biggs v. *Hoddinott*, [1898] 2 Ch. 307, followed.

Decision of Byrne J., [1899] 1 Ch. 747, reversed.

APPEAL by defendant from judgment of Byrne J. (1)

Hughes, *Q.C.*, and *R. J. Parker*, for the defendant, and *Eve*, *Q.C.*, and *A. & B. Terrell*, for the plaintiff, urged the same arguments as in the Court below, and, in addition to the cases there cited, referred to *Mainland* v. *Upjohn*. (2)

LINDLEY M.R. The question raised on this appeal is extremely important: I do not profess to be able to decide it on any principle which will be in harmony with all the cases; but it appears to me that the true principle running through them is not very difficult to discover, and I think that it can be applied so as to do justice in this case and in all other cases on the subject that may arise. The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or per-

(1) [1899] 1 Ch. 747. (2) (1889) 41 Ch. D. 126.

formance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that "once a mortgage always a mortgage"; but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation the payment or performance of which is to be secured is a clog or fetter within the rule: see 1 Powell on Mortgages, 6th ed. pp. 116 et seq.: Title, "How a Mortgage is considered in Equity." The right to redeem is not a personal right, but an equitable estate or interest in the property mortgaged. A "clog" or "fetter" is something which is inconsistent with the idea of "security": a clog or fetter is in the nature of a repugnant condition. If I convey land in fee subject to a condition forbidding alienation, that is a repugnant condition. If I give a mortgage on a condition that I shall not redeem, that is a repugnant condition. The Courts of Equity have fought for years to maintain the doctrine that a security is redeemable. But when and under what circumstances? On the performance of the obligation for which it was given. If the obligation is the payment of a debt, the security is redeemable on the payment of that debt. That, in my opinion, is the true principle applicable to the cases, and that is what is meant when it is said there must not be any clog or fetter on the equity of redemption. If so, this mortgage has no clog or fetter at all. Of course, the debt or obligation may be impeachable for fraud, oppression, or over-reaching: there the obligation is tainted to that extent and is invalid. But, putting such cases out of the question, when you get a security for a debt or obligation, that security can be redeemed the moment the debt or obligation is paid or performed, but on no other terms.

Now, let us see what the contract here is. It is not suggested that there has been fraud or undue influence or over-reaching or hard bargaining. Here is a lady who has a lease, of which there are ten years to run, subject to a rent and covenants. She wants to carry on a theatre, and she wants to borrow a sum of 2000*l.* for the purpose. What is the security she offers? The security of the lease is probably absolutely

C. A. 1899 SANTLEY v. WILDE. Lindley M.R.

insufficient. A security of that sort, unless it is kept up for the ten years, is very shaky. The lender took that view. He says, "I will lend you the money, and you may have five years in which to pay it; and you shall pay me a sum equal to one-third part of the net profit rents to be derived from any under-leases." What is the lender's position? It is obvious that his security depends not only on the solvency of the lady, but also on the success of the theatre. This is the kind of security proposed, and the lender says he will lend upon that. Accordingly the 2000*l.* is lent, and the mortgagor by her security covenants to repay the money by instalments; the deed then further goes on as follows: [His Lordship read the second testatum and covenant by the mortgagor for payment to the mortgagee of one-third of the net profit rents to be derived from any under-leases or undertenancies, and also the proviso for redemption; and continued:—]

That means that this lease is granted or assigned by the mortgagor to the mortgagee as security not only for the payment of the 2000*l.* and interest, but also for the payment of the one-third of the net profit rents to the end of the term. If I am right in the principle which I have laid down, that does not clog the right of redemption upon the performance of the obligation for which the security was given. That is the nature of the transaction, and the good sense of it.

But it is said that is not good law. Those, however, who say so lose sight of the true principle underlying the expression that there must be no clog or fetter on the equity of redemption. The plaintiff says, "I will pay off the balance of the 2000*l.* and interest, and you will give me back the lease, and this is the end of my obligation." But the mortgagee says, "No; that is not the bargain: you cannot redeem on those terms. On the contrary, you may pay me the 2000*l.* and interest, but if you do, you must also pay the one-third profit rents." On principle that is right: it follows from what I have said. That is the bargain, and there has been no oppression, and there is no reasonable legal ground for relieving this lady. As to the obligation or right to pay off this unpaid balance of the 2000*l.*, the defendant has, by calling it in, given the plaintiff the right

she would not otherwise have had. If she chooses to redeem, and to pay off the rest of her 2000*l.*, she can do so. Possibly she does not wish to pay it off unless she gets rid of the whole thing. The result is that the notice of appeal is substantially right, but the order should be prefaced thus: The plaintiff not desiring to pay off the 2000*l.* and interest, dismiss the action with costs; but on the counter-claim declare that the defendant is entitled to hold the mortgage during the residue of the term, notwithstanding all principal and interest has been paid, as a security for "a sum equal to one-third part of the clear net profit rents," and so on, following the language of the security. Then there must be an account of what is due on the security from the plaintiff to the defendant. As to the costs of the appeal, the defendant is entitled to them.

SIR F. H. JEUNE. I am of the same opinion. To my mind the case is covered by the decision in *Biggs* v. *Hoddinott*. (1) There is no doubt, in my judgment, what the bargain was, or that it was a reasonable bargain. There could not be anything more reasonable than that a person lending money on the security of a theatrical business should stipulate not only for the repayment of the sum lent and interest, but also for a share in such profits as might arise from the business, because if the business failed he would probably lose his money. This, then, was the bargain. Is it bad? It is not bad unless you hold that in a mortgage no collateral advantage can be obtained by reason of its being a mortgage. In *Biggs* v. *Hoddinott* (1) the Court was brought face to face with the point that there was an additional or collateral advantage outside the mortgage. There the mortgagee of a public-house had stipulated for a collateral advantage to himself as regarded the sale of malt liquors, and it was felt necessary to press the case so far as to say that there could be no such bargain. That proposition, however, the Court rejected. It was rejected not only by the Master of the Rolls, but also by Chitty and Collins L.JJ., who laid down that it was not good law to say that there could be no collateral advantage to a

(1) [1898] 2 Ch. 307.

C. A. 1899 SANTLEY v. WILDE. Sir F. H. Jeune.

mortgagee as part of his security. Another decision to the same effect is *Potter* v. *Edwards* (1), which was referred to by Kay J. in *Mainland* v. *Upjohn* (2) as being the first decision that broke in upon the series of cases that laid down the contrary principle. There the mortgagee lent 700*l.*, but stipulated that the mortgage should stand as a security for 1000*l.*, and it was decided that the mortgagee might insist on the payment of the larger sum as a condition for redemption. Such a stipulation is not really a clog or fetter on the equity of redemption, because the equity of redemption only arises upon the performance of the whole of the stipulation. Therefore, we come back to this—what under the bargain is the event upon which the equity of redemption arises? Here it arises only when the money actually lent has been repaid, and when the share of profit rents has also been paid. So regarded, there is no fetter on the equity of redemption; and there is no hardship or oppression.

ROMER L.J. I agree, but will add a few words, as the case is important. Before *Biggs* v. *Hoddinott* (3) there was, no doubt, considerable obscurity as to the extent of the equity rule with regard to contracts between mortgagors and their mortgagees. In that case it was pointed out that certain observations of the judges that had been more or less previously relied on, to the effect that a mortgagee could not stipulate for any collateral advantage, went too far and must be treated as not now representing the law. I refer particularly to the observations of the Master of the Rolls (Sir J. Trevor) in *Jennings* v. *Ward* (4), of Hargreave J. in *In re Edwards' Estate* (5), and to the observations of other judges in cases referred to by the late Kay J. in *James* v. *Kerr* (6) and *Mainland* v. *Upjohn*. (2) I take it that it is clearly established now, in the first place, that there is no such principle as is suggested, namely, that a mortgagee shall not stipulate for any collateral advantage for himself. He may so stipulate; and,

(1) (1857) 26 L. J. (Ch.) 468.
(2) 41 Ch. D. 126.
(3) [1898] 2 Ch. 307.
(4) (1705) 2 Vern. 520.
(5) (1861) 11 Ir. Ch. Rep. 367.
(6) (1889) 40 Ch. D. 449.

if he does, he may obtain a collateral advantage: nothing can be said against it, and he can enforce it, always assuming that the bargain is not unconscionable or oppressive. In the second place, I take it also to be clear that there is now no such principle as is suggested, namely, that where a collateral advantage is stipulated for by the mortgagee as a condition of the loan, that advantage or contract is to be presumed to have been given or made under pressure. There is no such presumption, but each case must be decided according to its own circumstances. The Court will look into the circumstances of each case and see whether the bargain come to is unconscionable or oppressive.

These principles are now established by *Biggs* v. *Hoddinott* (1), and I will only add that I agree with the other members of the Court that the decision of Byrne J. cannot be sustained; though I can well understand that he, as a judge of first instance, thought himself bound to come to the conclusion he did.

Solicitors: *Page & Scorer; Fladgate & Co.*

(1) [1898] 2 Ch. 307.

G. I. F. C.

C. A. 1899 July 24.

In re AFRICAN GOLD CONCESSIONS AND DEVELOPMENT COMPANY.

MARKHAM AND DARTER'S CASE.

[0091 of 1897.]

Company—Shares issued as Fully Paid — Sufficiency of Filed Contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

The object of s. 25 of the Companies Act, 1867, is to have it shewn what shares are not to be paid for in cash, and the nature of the consideration other than cash which is to be given, but not to compel disclosure of the agreement in all its details.

On December 6, 1894, a written agreement was made between a syndicate and H., as trustee for an intended company, whereby it was agreed that the vendors should sell, and the company should purchase, a property called Millwood, in the Cape Colony, which was fully described, and that as consideration for the sale H., as the trustee for the intended company, should on or before December 15 allot to the vendors, or as they might direct, 22,500 fully paid shares of 10*s.* each in the intended company, and should also allot to the vendors, or as they might direct, 277,493 shares of 10*s.* each in the intended company upon each of which 8*s.* should be deemed to have been paid. This agreement was never filed with the Registrar of Joint Stock Companies. The company was registered on December 6, 1894, and on December 11 the directors resolved to adopt the agreement. On December 12 an agreement in writing was made between the syndicate (called the vendors) and the company which provided that the company would forthwith allot to the vendors, or their nominee or nominees, 22,500 fully paid shares of 10*s.* each in the company, and should allot to the vendors, or as they might direct, 277,493 shares of 10*s.* each in the company upon each of which 8*s.* should be deemed to have been paid "as mentioned in an agreement dated December 6, 1894. In consideration of the allotment of such shares as aforesaid the vendors will forthwith thereafter give to the company possession of the premises more particularly mentioned in the said agreement. In all other respects the said agreement is hereby confirmed." On December 19, 1894, another agreement in writing was made between the company and the syndicate, which provided that, in consideration of the syndicate agreeing to give the company immediate possession of "the lands and premises situate in the mining district of Millwood, in the Cape Colony, more particularly mentioned and referred to in an agreement dated December 6, 1894, made between the syndicate and H., as trustee for the company," the company should forthwith allot to the syndicate, or to their nominee or nominees, 22,500 fully paid shares of 10*s.* each in the company, and for all purposes the said shares should be deemed fully paid shares in the company. The syndicate

should with all possible expedition procure the lands and premises to become vested in the company free from all incumbrances. Both the contracts of December 12 and December 19 were filed with the Registrar of Joint Stock Companies—the first on December 13 and the second on December 28. On January 2, 1895, 1406 shares of 10*s.* each were allotted and issued as fully paid to Markham and Darter respectively as nominees of the syndicate. The company being in liquidation:—

Held, that the filed contract of December 19 was a sufficient compliance with the requirements of s. 25 of the Companies Act, 1867, or that at any rate the two contracts of December 12 and December 19 were sufficient.

Decision of Wright J., [1899] 1 Ch. 414, affirmed.

APPEAL against a decision of Wright J. (1)

The question was whether shares in the above company, which had been issued as fully paid up to H. W. Markham and W. S. Darter, were sufficiently protected by a contract filed under s. 25 of the Companies Act, 1867.

By an agreement in writing, dated December 6, 1894, and made between the Homtini Syndicate, thereinafter called the vendors, and Henry Harris, as trustee for and on behalf of the (then intended) African Gold Concessions and Development Company, it was agreed, amongst other things, as follows:—

"1. The vendors shall sell, and the intended company shall purchase, all the estate, right, title and interest of the vendors of and in the premises known as Millwood, in the Cape Colony of South Africa, consisting of 206½ acres or thereabouts, known as claims Nos. 2577 to 2596, and fifty alluvial claims situated within the prospecting area defined by resolution of Parliament dated 9th and 13th of August, 1888, free of licence fees, subject to the provisions of the said resolution and to such of the regulations in force in the Millwood mining area as are not inconsistent therewith, together with the right to lead water from the Homtini river; also with all plant and mills, stamps, outhouses, machinery and other property belonging to the vendors on the said premises.

"2. As the consideration for the sale the said Henry Harris, as trustee for the said intended company, shall, on or before the 15th day of December inst., allot to the vendors, or as they may direct, 22,500 fully paid shares of 10*s.* each in

(1) [1899] 1 Ch. 414.

C. A. 1899 MARKHAM AND DARTE'S CASE.

the said intended company, to be numbered 8 to 22,507, both inclusive, and shall also allot to the vendors, or as they may direct, 277,493 shares of 10*s.* each in the said intended company, to be numbered 22,508 to 300,000, both inclusive, upon each of which said 277,493 shares the sum of 8*s.* shall be deemed to have been paid.

"9. The said intended company shall procure an agreement respecting the allotment of such shares to be duly filed in the joint stock registry, and upon the adoption of this agreement by the said intended company the said Henry Harris shall be discharged from all liability hereunder."

This agreement was never filed with the Registrar of Joint Stock Companies.

On December 6, 1894, the African Company was registered, and on December 11 the directors resolved to adopt the agreement.

An agreement in writing, dated December 12, 1894, was made between the Homtini Syndicate (thereinafter called the vendors) and the African Company (thereinafter called the company) which contained only the following clauses:—

"The company shall forthwith allot to the vendors, or their nominee or nominees, 22,500 fully paid shares of 10*s.* each in the said company, to be numbered 8 to 22,507, both inclusive, and shall allot to the vendors, or as they may direct, 277,493 shares of 10*s.* each in the said company, to be numbered 22,508 to 300,000, both inclusive, upon each of which said shares the sum of 8*s.* shall be deemed to have been paid, leaving a liability of 2*s.* per share only thereon, as mentioned in an agreement dated the 6th day of December, 1894.

"In consideration of the allotment of such shares as aforesaid the vendors will forthwith thereafter give to the company possession of the premises more particularly mentioned in the said agreement. In all other respects the said agreement is hereby confirmed."

Another agreement in writing, dated December 19, 1894, was made between the African Company and the Homtini Syndicate, which contained only the following clauses:—

"1. In consideration of the [syndicate] agreeing to give the

[African Company] immediate possession of the lands and premises situate in the mining district of Millwood, in Cape Colony of South Africa, more particularly mentioned and referred to in an agreement dated the 6th day of December, 1894, made between the said [syndicate] of the one part, and Henry Harris as trustee for the said [African Company] of the other part, the said [African Company] shall forthwith allot to the said [syndicate], or to their nominee or nominees, 22,500 fully paid shares of 10*s.* each in the said [African Company], to be numbered 8 to 22,507 both inclusive, and for all purposes the said shares shall be deemed fully paid shares in the said company.

"2. The said [syndicate] shall with all possible expedition procure the lands and premises to become vested in the said [African Company] free from all incumbrances, according to the law in force for the time being of the said mining district of Millwood.

"3. The said [syndicate] shall also with all possible despatch transfer and vest in the said [African Company] all the water rights and other easements upon the said property or appertaining thereto belonging to them or to their predecessor in title."

The contracts of December 12 and December 19, 1894, were filed with the Registrar of Joint Stock Companies respectively on December 13 and December 28, 1894.

On January 2, 1895, 1406 shares of 10*s.* each were allotted and issued as fully paid to Markham and Darter respectively as nominees of the syndicate.

The African Company about the end of 1896 passed special resolutions for the voluntary winding-up of the company and the appointment of a liquidator, and on April 29, 1897, an order was made, on the application of the liquidator, that he or any contributory should be at liberty from time to time to apply to the Court to determine any question arising in the winding-up, and to exercise, in respect of the enforcing of calls or of any other matter, all or any of the powers which the Court could or might exercise if the company was being wound up by the Court.

The names of Markham and Darter were at first placed on

C. A. 1899

MARKHAM AND DARTER'S CASE.

the list of contributories in respect of fully paid shares; but on May 9, 1898, liberty was given by the registrar to the liquidator to alter the register of shareholders and the list of contributories by stating that the 1406 shares held by Markham and Darter respectively were wholly unpaid.

In August, 1898, Markham and Darter took out a summons asking that they might respectively be reinstated in the list of contributories and register of shareholders as fully paid up shareholders.

Wright J. held that the filed contract of December 19, taken in connection with the unfiled contract of December 6, was sufficient under s. 25, and that the shares must be treated as fully paid.

The liquidator appealed.

Jenkins, *Q.C.*, and *Quin*, for the liquidator. The first registered contract, that of December 12, does not contain a sufficient statement of the consideration given to the company for the issue of the fully paid shares, so as to comply with s. 25 of the Companies Act, 1867. (1) There is really no distinction in substance between this case and *In re Kharaskhoma Exploring and Prospecting Syndicate* (2), in which it was held that the consideration had not been sufficiently stated in the contract. In that case the words were "for the consideration therein mentioned," that is, in a previous unfiled contract. In the present case the words are, "the premises more particularly mentioned in the said agreement," that is, the agreement of December 6. There is practically no difference between the two.

[LINDLEY M.R. Is not the defect supplied by the contract of December 19?]

The two contracts are not connected together, and the number of shares to be issued to the vendors does not corre-

(1) Sect. 25: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

(2) [1897] 2 Ch. 451.

spond. The second contract states the consideration to be 22,500 fully paid shares, omitting altogether the 277,493 partly paid shares. No fresh consideration appears to be given by the syndicate for the contract of December 19, unless indeed they relinquished their right to the partly paid shares. But it is clear that they did not do that. The whole consideration ought to appear in the registered contract—the consideration on both sides. The document of December 19 was a sham. It may indeed be called fraudulent. It states that the syndicate had agreed to sell the property for fully paid shares, whereas in fact they had agreed to sell it for fully paid shares and partly paid shares. A man who knew nothing and went to Somerset House to search the register would come to the conclusion either that the contract of December 12 had been abandoned, or that the two contracts related to different properties. The object of s. 25 was that the real position of the company should be known to any one who looked at the register. In *In re S. Frost & Co.* (1) the point was whether the consideration was defined with sufficient particularity, and both Romer J. and the Court of Appeal held that it was. The present point is, what is the contract which s. 25 requires to be filed? It is submitted that it is the whole contract. Suppose the real contract was to sell a property for 50,000*l.* in cash and 50,000*l.* in fully paid shares, and the document filed stated that the property was sold for 50,000*l.* in fully paid shares, that would be a fraud. Sect. 25 requires that a contract in writing shall be filed. It must be a "contract," and the document of December 19 is not in law a contract at all. No fresh consideration was given for it. The Statute of Frauds has no bearing on the case: *In re New Eberhardt Co.* (2)

Buckley, Q.C., and *Rowden, Q.C.*, for the shareholders, were not called upon.

[The question of estoppel which was raised in the Court below was not argued upon the appeal.]

LINDLEY M.R. I do not think there is any real difficulty in this case. We have considered s. 25 again, a section which I

(1) [1898] 2 Ch. 556; [1899] 2 Ch. 207. (2) (1889) 43 Ch. D. 118.

C. A. 1899

MARKHAM AND DARTER'S CASE.

Lindley M.R.

suppose will give rise to controversy so long as it lasts. The first thing to bear in mind is, that it is one of a group of sections which is headed "calls on shares." A shareholder says, "I am the holder of so many shares in a limited company, and I am not going to pay for them in cash." Why? He cannot say that except subject to s. 25. That section says distinctly that he must pay in cash unless there is a registered contract in writing between him and the company determining that he is to pay for the shares in some other way. Sect. 25 says in substance that the contract must shew what the shareholder is to pay instead of cash. To my mind it would be to pursue the wrong inquiry to ask what the company is to give to the shareholder. That is not the question. The question is, what is the shareholder to give to the company for the shares? Primâ facie, he is bound to give cash. If he is not to give cash, what is he to give? Is there any filed contract in writing shewing what he is to give?

Now, when we look at the facts of this case it appears to me that the second filed contract of December 19 shews plainly enough what the shareholder is to give instead of cash. To my mind that document if it stood alone would be a clear contract between him and the company complying with s. 25 to the effect that he is to give for the shares, not cash but this property in South Africa. If you look at the contract from his point of view, that satisfies the statute. If you look at it from the other point of view, Mr. Jenkins says that the shareholder is not giving this property to the plaintiff for these fully paid shares, because that is not the whole consideration; there is a further consideration of other shares—shares paid up to the extent of 8*s*. per share—which is not alluded to in the contract. That is no doubt true in that point of view; but if you go back and look at the other registered contract (which is defective only because the property to be taken is not sufficiently defined), and consider the two documents together, you find that the property to be taken is sufficiently defined by a contract in writing which is registered. There are two pieces of paper, and not one, but you get the fact which you ought to find in a registered contract in writing, that the shareholder is

not to pay for his shares in cash, but is to pay in something else—namely, property in Africa. That appears to me to be amply sufficient. I will not say whether the first contract alone would or would not be enough: it is somewhat on the line, so I express no opinion about that. But to my mind the second filed contract or, at any rate, the two together, are sufficiently clear and plain. In my opinion the learned judge was right.

SIR F. H. JEUNE. I agree, and I think the case is perfectly plain when we consider what the object of s. 25 was. It seems to me clear that the object of that section was that it should be shewn and made public what shares are not to be paid for in full in cash. That is to be shewn by a registered contract determining otherwise—determining, that is to say, that something else than cash is to be given or has been given for the shares. It is necessary, inasmuch as it is provided that there shall be a contract, that it should be shewn what the consideration is. That is in substance what was held in *In re Kharaskhoma Exploring and Prospecting Syndicate* (1), not that it is necessary that it should be shewn in full detail, for it is not the object of s. 25 that it should be shewn whether the company has or has not made a good bargain. The object is to shew by means of a filed contract what shares are not to be paid for in cash, and of course, there being a contract, it is necessary to shew what the nature of the consideration is, but not more than that.

Now, in the present case it is quite clear upon these documents that 22,500 shares are to be taken as not having been paid for or not liable to be paid for in full in cash, but as shares for which another consideration has been given. What that other consideration is is abundantly clear. It is not stated in detail, but it is clear that it is lands and properties in South Africa. It is quite true that in order to obtain that information you may have to look at both the contracts, and it may be that any one looking at the two contracts might find some little difficulty in ascertaining the exact result of them. But his only doubt would be whether the 22,500 fully paid shares

(1) [1897] 2 Ch. 451.

C. A.
1899
MARKHAM AND DARTER'S CASE.
Sir F. H. Jeune.

were the only shares which were not to be paid for in full in cash. He could have no doubt about two things: first, that the 22,500 shares were shares for which cash was not to be paid, and, secondly, that the reason for that was that there was a contract which determined within the meaning of s. 25 that for those shares not cash, but properties in South Africa had been given. That appears to me to satisfy s. 25 as regards these 22,500 shares, and that is the whole question.

ROMER L.J. I agree. The contract of December 19, 1894, was, in my opinion, a full, a sufficient, and a truthful contract, You have to bear in mind what the object of the contract is. It is to be a contract with regard to the shares. This contract states the purpose, it states the shares, and it states the consideration for them in the only way in which it could be stated. We have not to deal with the question whether a contract for the sale of the premises contracted to be sold by the vendors to the company ought to be filed. The contract of December 19 is complete in every respect; the consideration for the shares is sufficiently and truthfully stated, and the suggestion that there was something fraudulent because this contract did not also state that there were other shares covered by the same consideration passing to the company is, in my opinion, wholly unfounded.

LINDLEY M.R. The appeal will be dismissed with costs.

Solicitors: *Clayton, Sons & Fargus; Bird & Eldridges.*

W. L. C.

KEKEWICH J.

1899

June 24.

In re MARYON-WILSON. WILSON *v.* MARYON-WILSON.

[1899 M. 1155.]

Revenue—Settlement Estate Duty—Incidence—Settlement not made by Will but by Antecedent Instrument—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 5—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19.

By the marriage settlement of his daughter in 1895 a testator covenanted for the payment of 25,000*l.* to the trustees thereof within six calendar months after his decease "without any deduction." By his will he directed his trustees and executors to pay the 25,000*l.* to the trustees of the settlement:—

Held, that the obligation imposed upon the testator's estate by the covenant was fully performed when the sum of 25,000*l.* was paid to the trustees of the settlement without any deduction in respect of estate duty, and that the settlement estate duty was payable out of the 25,000*l.*, and not out of the testator's general residuary estate.

ADJOURNED SUMMONS.

By an indenture of settlement dated August 6, 1891, being the settlement made in contemplation of the marriage then intended and afterwards solemnized between Philip Beauchamp Taylor and Annie Emily Maryon-Wilson, a daughter of the testator, Sir Spencer Maryon Maryon-Wilson, baronet, the testator covenanted with the trustees of the settlement that he would, by his will or a codicil thereto, bequeath to Annie Emily Maryon-Wilson not less than the sum of 25,000*l.* payable immediately after his death, and the settlement contained a covenant on the part of Annie Emily Maryon-Wilson for the payment by her of the 25,000*l.* to the trustees to be held by them upon the trusts of the settlement.

By an indenture of settlement dated July 23, 1895, being the settlement made in contemplation of the marriage then intended and afterwards solemnized between Guy Charles Hardy and Eva Kathleen Maryon-Wilson, another daughter of the testator, the testator covenanted with the trustees of that settlement that in case the marriage should take place his executors or administrators should, within six calendar months after his death, pay to the trustees or trustee of that

KEKEWICH J.

1899

MARYON-WILSON, *In re.* WILSON *v.* MARYON-WILSON.

settlement the sum of 25,000*l.*, with interest for the same at the rate of 3½*l.* per cent. per annum from the day of the death of the testator, "without any deduction," and by the same settlement it was declared that the trustees thereof should hold the said sum of 25,000*l.* upon the trusts thereinafter declared, being the usual trusts adopted in marriage settlements with reference to the wife's property, except that the ultimate trust was in favour of the testator, his executors, administrators, or assigns, and so as to form part of his residuary personal estate.

Eva Kathleen Hardy was at the date of her marriage an infant. She attained the age of twenty-one years on December 12, 1895, and by an indenture dated December 24, 1895, the settlement of July 23, 1895, was duly ratified and confirmed by her.

The testator, Sir Spencer Maryon Maryon-Wilson, by his will dated August 1, 1896, devised certain freehold estates in Middlesex and Kent to trustees for the term of 2000 years upon trust to raise thereout and pay several sums of money, including a sum of 25,000*l.* to the trustees or trustee for the time being of the settlement made on the marriage of his daughter Eva Kathleen Hardy, with interest thereon from the testator's death after the rate of 3*l.* 10*s.* per cent. per annum, and the testator also thereby made provision for the payment of 25,000*l.* by the trustees of his will on behalf of his daughter Annie Emily Taylor to the trustees or trustee of the settlement of August 6, 1891, in satisfaction of her covenant to settle 25,000*l.* in such settlement contained. The will also contained the following direction: "I declare it to be my will that the estate duty and further estate duty imposed by the Finance Act, 1894, and all the succession and legacy duties, if any, to become on my death payable on or in respect of any devises legacies or bequests made by me shall in and according to the proper apportioned part thereof be borne by the respective devisees and legatees under my will and any codicils thereto according to the benefits taken by them respectively."

The testator died on December 31, 1897, and his will was duly proved by the executors therein named.

Estate duty at the rate of 7½ per cent. was claimed by the

Inland Revenue authorities on the whole of the testator's estate, both real and personal, including the two sums of 25,000*l.* above mentioned. Settlement estate duty at the rate of 1 per cent. was also claimed in respect of the sum of 25,000*l.* subject to the settlement of July 23, 1895, but no such claim was made in respect of the sum of 25,000*l.* subject to the settlement of August 6, 1891.

Questions having arisen as to the manner in which the estate duty and settlement estate duty ought ultimately to be borne, as between the executors and trustees of the will and the trustees of the two settlements, the present summons was taken out by the former as plaintiffs against the latter as defendants for the determination of these questions. The summons was adjourned into court, and upon its coming on for hearing it was not disputed that the estate duty ought to be paid by the plaintiffs out of the testator's general estate; and accordingly the only question argued was as to the incidence of the settlement estate duty as between the plaintiffs, the executors and trustees of the will, on the one hand, and the defendants, the trustees of the settlement of July 23, 1895, on the other hand.

O. L. Clare, for the plaintiffs, the executors and trustees of the will. The settlement estate duty ought to be paid out of the 25,000*l.*, and not out of the general residuary estate of the testator. It must be admitted that the clause contained in the will does not affect the question, as it was impossible for the testator by any clause in his will to modify or vary the covenant into which he had previously entered. It must also be admitted that s. 19 of the Finance Act, 1896, is not directly applicable, because the 25,000*l.* was not settled by the will of the testator, but by an independent antecedent instrument. But the section may nevertheless be referred to as shewing the general scheme of the Acts, which is to throw the burden of the settlement estate duty upon the settled property. The section was passed to obviate the effect of the decision in *In re Webber* (1), that where pecuniary legacies or shares of residue

(1) [1896] 1 Ch. 914.

KEKEWICH J. 1899 MARYON-WILSON, *In re.* WILSON *v.* MARYON-WILSON.

are settled by a will the estate duty and settlement estate duty must be borne by the general estate. The section recognises that decision as sound, but overrules the principle of it for the future. The section corrects the law so far as necessary, but does not deal with the case where the settlement is made outside the will. It is obviously assumed that in such a case the duty will fall on the settled property. It would be strange if the burden on the general estate were to be greater because the settlement had not been made by the testator himself. It is plain that there can be no general rule that where the settlement is not made by the testator the settlement estate duty must fall on his estate. If, for example, a daughter by her marriage settlement covenanted to settle after-acquired property, and her father by will gave her 25,000*l.*, that money would be caught by the covenant; but it would be absurd to suppose that the father's executors were to pay the settlement estate duty. It cannot be incumbent on executors to pay duty arising altogether outside the will. The provisions of the Finance Act, 1894, shew that where, as here, there is a debt due from the testator's estate, the trustees of the debt must pay the settlement estate duty. [He referred to the Finance Act, 1894, s. 5, sub-s. 1, and s. 6, sub-ss. 1 and 2.]

The expression "without any deduction" in the covenant for payment means without any deduction payable by the executors of the testator. The settlement estate duty is a sum to be paid in respect of the thing settled. The obligation of the testator is performed when his executors have handed to the trustees of the settlement of July 23, 1895, the sum of 25,000*l.* clear of estate duty.

Crawley, for the defendants, the trustees of the settlement of July 23, 1895. First, the settlement estate duty is part of the estate duty, and the incidence of it must, therefore, be the same as that of the estate duty. It is admitted that the estate duty must be paid out of the general residuary estate of the testator, and so also must the settlement estate duty. Sect. 19 of the Finance Act, 1896, was passed merely to obviate the effect of the decision in *In re Webber* (1), and that decision

(1) [1896] 1 Ch. 914.

shews what the previous law was, and, so far as it is not expressly varied by the Act, holds good: see *In re Gibbs.* (1) North J. in deciding *In re Webber* (2) proceeded upon the footing that the settlement estate duty was part of the estate duty.

Secondly, the covenant is for payment "without any deduction," and those words alone, apart from the statutes, are sufficient to throw the burden of the duty on the general residuary estate: see *In re Parker-Jervis.* (3) The obligation of the testator under the covenant is not performed until the sum of 25,000*l.* is paid over to the trustees of the settlement of July 23, 1895, so that they can lawfully hold it, as a clear sum, upon the trusts of the settlement, and that can only be done by exonerating the 25,000*l.* from the settlement estate duty.

Under s. 8, sub-s. 3, of the Finance Act, 1894, the executor is accountable for estate duty (which includes settlement estate duty) on the whole of the personal property of the deceased wheresoever situate.

Austen-Cartmell, for the defendants, the trustees of the settlement of August 6, 1891.

O. L. Clare, in reply. Sub-s. 3 of s. 8 of the Finance Act, 1894, merely amplifies s. 6. By sub-s. 3 the executor is accountable for personal property "of which the deceased was competent to dispose at his death," and the testator was not competent to dispose of the 25,000*l.*, which was a debt due from his estate. The provisions of sub-ss. 3 and 4 of s. 8, so far as they go, tend to support the view that settlement estate duty is to be borne by the property settled.

KEKEWICH J. The distinction to be borne in mind in this case is that between a legacy or share of residue settled by the will of a testator, and a legacy or share of residue given by the testator, whether in performance of an obligation or as an act of bounty, to persons who are to hold it on the trusts of an outside settlement, creating limitations and successions, and by reason thereof being within the provisions of the Finance Acts which impose settlement estate duty. That distinction has

(1) [1898] 1 Ch. 625. (2) [1896] 1 Ch. 914, 922. (3) [1898] 2 Ch. 643.

KEKEWICH J.

1899

MARYON-WILSON, *In re.*

WILSON *v.* MARYON-WILSON.

been the subject of judicial decision, specially in the case of *In re Webber* (1), and also of legislative enactment by s. 19 of the Finance Act, 1896, which has not adopted the judicial decision but, by overruling it, has recognised it as sound. In the case of *In re Webber* (1) the testator had bequeathed legacies to be held upon trusts in favour of his daughters and their respective children, similar to the usual trusts contained in a marriage settlement. North J. held that in a case of that kind the full amounts of the legacies must be paid as the testator had directed that they should be paid, with the result that not only the estate duty on the whole estate, but also the settlement estate duty leviable in respect of the particular legacies, must be paid out of and borne by the general residuary estate, for that, if that were not done, the intention of the testator would not be carried out. A testator has given, let us say, 5000*l.* on certain trusts; if from that 5000*l.* you deduct settlement estate duty, you are giving to the beneficiaries something less than the testator intended. That is the substance, though not the language, of the decision of North J. Then the Legislature interposes, and by s. 19 of the Finance Act, 1896, says that "the settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate." The enactment leaves at large the question how the settlement estate duty is to be borne where the settlement is not made by the will of the deceased, but is made outside the will. In the present case, as often happens, not only was the settlement of July 23, 1895, with which I am now dealing, made with the knowledge of the testator, but he was a party to it. He covenanted for the payment of a sum of 25,000*l.*, for which he afterwards made express provision by his will. The settlement was of the marriage portion of a daughter of his, and the portion was not to be payable until after his own death; but, as regards the principle to be applied, that is really immaterial. Suppose that he had not covenanted to

(1) [1896] 1 Ch. 914.

pay the 25,000*l.*, but had simply bound himself by a voluntary instrument to pay to a person who had settled it, or take the case of a covenant to pay the 25,000*l.*, followed by a settlement made, not at the time, but some time afterwards, how could it be said that the testator was under any obligation to pay the settlement estate duty which attached to a settlement, not made by him, but by the persons to whom he paid the money? I see no reason for saying that, under the Act of Parliament or on any principle. I follow Mr. Clare's argument that s. 8, sub-ss. 3 and 4, of the Act of 1894, assist him rather than those who say that the settlement estate duty ought to be borne by the testator's estate. I think that the obligation imposed upon the testator's estate by his covenant to pay the 25,000*l.* is performed when 25,000*l.* is handed over intact to the trustees of the settlement of July 23, 1895. Whether the covenant be, as it is here, to pay to the trustees, or be to pay to the daughter who has herself settled the money or covenanted to settle, seems to me to be immaterial. The beneficiaries under the settlement must bear the burden of the settlement estate duty, whether the property comes to them under s. 8 or otherwise. They are accountable for the duty in respect of that which comes to them.

There is one other point to which I must refer. It is said that the covenant is for payment "without any deduction," and that the duty is a deduction. That is so as regards the estate duty, but not as regards the settlement estate duty. The 25,000*l.* must be paid without deduction for any duty the burden of which interposes between the estate which pays and the persons who receive the money. They are to receive it without any deduction for estate duty; but they must bear the burden of the settlement estate duty which the Legislature has thought fit to impose. In my opinion settlement estate duty, where the settlement is made, not by the will, but by an outside instrument, must be borne by those who take under that instrument. It follows that the settlement estate duty must be paid out of the 25,000*l.*

Solicitors: *Bell, Steward, May & How.*

C. C. M. D.

KEKEWICH J.

1899

July 4, 5.

STOCK *v.* MEAKIN.

[1899 S. 340.]

Local Government—Streets—Private Street—Improvements—Charge on Premises—Date—Completion of Works—Final Apportionment—Incumbrance—Vendor and Purchaser—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *s.* 13.

The apportioned expenses of private street works executed under the Private Street Works Act, 1892, become a charge on the premises affected thereby as from the date of the completion of the works, and not merely as from the date of the final apportionment.

If, therefore, the premises are sold free from incumbrances after the completion of the works, but before the date of the final apportionment, the sum finally apportioned thereon is payable by the vendor.

WITNESS ACTION.

By an agreement made October 10, 1898, between the defendant of the one part, and E. W. Johnson as agent for the plaintiff of the other part, the defendant agreed to sell and the plaintiff to buy a piece of land in West Ham, Essex, for 1500*l.*

Clause 2 of the agreement provided that the purchase-money was to be paid and the purchase completed on November 11 then next, and, the purchaser paying the balance of his purchase-money, was as from that day to be let into possession, and up to that day all rent (if any) and outgoings were (if necessary) to be apportioned.

Clause 5 provided that the property was sold subject (inter alia) to any subsisting liability to repair roads or streets.

The premises agreed to be sold abutted on Lansdown Road and Queen's Road, and the plaintiff inquired whether these roads had been taken over by the parish and all charges in connection therewith paid. The defendant's solicitors replied: "We believe that these roads have not been taken over by the parish, but inquiries are being made of the vendor"; and later, "The vendor does not know, but he has never had to pay any

charges for the roads. He informs us that they have been made and curbed."

The conveyance was completed on November 22, 1898, the defendant conveying as beneficial owner.

On December 29, 1898, the council of the county borough of West Ham gave notice to the plaintiff that the premises were liable to be charged with the sum of 130*l.* 14*s.* as the finally apportioned expenses of certain private street works in Queen's Road executed by the council as urban sanitary authority of the borough under the Private Street Works Act, 1892. The notice stated that unless the sum was paid within one month interest at 4 per cent. per annum would be charged from the date thereof.

It appeared that on July 27, 1897, the council had resolved to make up the street, and had made a provisional apportionment under the Act, of which they had sent notice on August 5, 1897, to the then owner of the premises, but that such notice had been returned through the dead letter office. The defendant had bought the premises on December 15, 1897, without notice of the above proceedings. The works were commenced on April 4, 1898, and completed on July 26, 1898, i.e., before the date of the agreement to sell to the plaintiff. The council resolved to take over the roads on October 11, 1898, and made the final apportionment of expenses on November 29, 1898.

On January 13, 1899, the plaintiff called upon the defendant to pay the sum charged on the premises, but the defendant declining to do so, the plaintiff paid it himself on January 26.

He now sought to recover this sum from the defendant on the ground that it was an outgoing and incumbrance which the defendant was liable to pay under the agreement for sale and under the covenants for title implied in the conveyance, the charge coming into existence at the date the works were completed.

The defendant denied liability, contending that there was no charge until the final apportionment, which was subsequent to the plaintiff's purchase.

The facts were admitted, and the arguments were mainly

KEKEWICH J.

1899

STOCK v. MEAKIN.

directed to the construction of certain sections of the Private Street Works Act, 1892, and the Public Health Act, 1875. (1)

(1) The Public Health Act, 1875, provides as follows :—

Sect. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) . . . . is not sewered . . . . and made good . . . . to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting . . . . on such parts thereof as may require to be sewered . . . . require them to sewer . . . . or make good . . . . the same . . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses . . . ."

Sect. 257: "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act . . . . such expenses may be recovered, together with interest . . . . from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred . . . ."

The Private Street Works Act, 1892, provides :—

Sect. 1: "This Act . . . . shall be construed as one with the Public Health Acts, ... and this Act and the Public Health Acts may be cited together as the Public Health Acts."

Sect. 2: "This Act shall extend and apply to any urban sanitary district in which it is respectively adopted under the provisions of this Act."

Sect. 3 contains provisions as to the adoption of the Act.

Sect. 6: "(1.) Where any street . . . . is not sewered . . . . made good, and lighted to the satisfaction of the urban authority, the urban authority may . . . . resolve with respect to such street . . . . to do any one or more of the following works (in this Act called private street works); that is to say, to sewer, ... or make good . . . . such street . . . .; and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting . . . . on such street . . . .

"(2.) The surveyor shall prepare . . . .

"(*a*) A specification of the private street works referred to in the resolution . . . .;

"(*b*) An estimate of the probable expenses of the works;

"(*c*) A provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act.

"Such specification, ... estimate, and provisional apportionment shall comprise the particulars prescribed in Part I. of the schedule to this

P. O. Lawrence, Q.C., and *P. F. Wheeler*, for the plaintiff.

The Private Street Works Act, 1892, must be construed as one

KEKEWICH J.

1899

STOCK v. MEAKIN.

Act, and shall be submitted to the urban authority, who may by resolution approve the same . . . ." (The Schedule, Part I., provides that provisional apportionments shall state (inter alia) "the amounts charged on the respective premises").

"(3.) The resolution approving the specifications, ... estimates, and provisional apportionments shall be published . . . . and copies thereof shall be served on the owners of the premises shewn as liable to be charged in the provisional apportionment . . . . During one month from the date of the first publication the approved specifications, ... estimates, and provisional apportionments (or copies thereof certified by the surveyor), shall be kept deposited at the urban sanitary offices, and shall be open to inspection at all reasonable times."

Sect. 7: "During the said month any owner of any premises shewn in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds; (that is to say)

"(*a*) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act; . . . .

"(*e*) That any premises ought to be excluded from or inserted in the provisional apportionment;

"(*f*) That the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection . . . ."

Sect. 8 provides for the hearing and determination of objections.

Sect. 12: "(1.) When any private street works have been completed, and the expenses thereof ascertained, the surveyor shall make a final apportionment . . . . and such final apportionment shall be conclusive for all purposes; and notice of such final apportionment shall be served upon the owners of the premises affected thereby; and the sums apportioned thereby shall be recoverable in manner provided by this Act, or in the same manner as private improvement expenses are recoverable under the Public Health Act, 1875, ...

"(2.) Within one month after such notice the owner of any premises charged with any expenses under such apportionment may, by a written notice to the urban authority, object to such final apportionment on the following grounds, or any of them:" (Here follow certain grounds of objection.)

"(3.) Objections under this section shall be determined in the same manner as objections to the provisional apportionment."

Sect. 13: "(1.) Any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged (to the like extent and effect as under section 257 of the Public Health Act, 1875) with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the rate of 4*l.* per centum per annum, and the urban authority shall, for the recovery of such sum and interest, have all the same powers and remedies under the Conveyancing and Law of Property Act, 1881, and other-

KEKEWICH J.

1899

STOCK v. MEAKIN.

with the Public Health Acts, and the decisions on those and analogous Acts are applicable. The charge, therefore, existed as soon as the works were completed, and was an outgoing payable by the defendant under the contract: *Midgley* v. *Coppock* (1); *In re Furtado and Jeffries* (2); *Tubbs* v. *Wynne* (3); *Tottenham Local Board of Health* v. *Rowell* (4); *In re Bettesworth and Richer* (5); *Hornsey Local Board* v. *Monarch Investment Building Society*. (6) *In re Boor* (7), which casts a doubt on *In re Bettesworth and Richer* (5), is distinguishable. In that case the work was completed during the life of a tenant for life, but the assessment was not made until after his death. The tenant for life never became liable to pay the sum assessed, and there was no covenant against incumbrances. Kay J. doubted whether the charge even existed during the life of the tenant for life, but held that in any case, as he never became liable to pay it, it was not an outgoing which the remainderman could recover against his estate. The decision is explained in *Tubbs* v. *Wynne*. (3) The doubt is only a dictum, and the decision is not applicable, as in the present case there is an implied covenant against incumbrances. The charge was clearly an incumbrance within such covenant: *Egg* v. *Blayney* (8); and the defendant ought to have discharged it. Clause 5 of the contract does not apply, as the liability in

---

wise as if they were mortgagees having powers of sale and lease and of appointing a receiver."

Sect. 14: "The urban authority, if they think fit, may from time to time (in addition and without prejudice to any other remedy) recover summarily in a court of summary jurisdiction, or as a simple contract debt by action in any court of competent jurisdiction, from the owner for the time being of any premises in respect of which any sum is due for expenses of private street works the whole or any portion of such sum, together with interest at a rate not exceeding 4*l.* per centum per annum, from the date of the final apportionment till payment thereof."

Sect. 25: "Neither sections 150, 151, and 152 of the Public Health Act, 1875, nor section 41 of the Public Health Acts Amendment Act, 1890, shall apply to any district or part of a district in which this Act is in force."

(1) (1879) 4 Ex. D. 309.
(2) (1883) 27 Sol. J. 466.
(3) [1897] 1 Q. B. 74.
(4) (1880) 15 Ch. D. 378, 392.
(5) (1888) 37 Ch. D. 535.
(6) (1889) 24 Q. B. D. 1, 5, 10.
(7) (1889) 40 Ch. D. 572.
(8) (1888) 21 Q. B. D. 107.

question is not a subsisting liability to repair roads, but a liability to pay for past repairs.

There is nothing in the Act of 1892 to alter the old rule that the charge takes effect from the time the works are completed. The words "shall stand and remain charged" in s. 13 must refer to a charge existing before the final apportionment, and the Schedule, Part I., directs that the provisional apportionments shall state "the amount charged" on the respective premises.

Warrington, Q.C., and *Vaughan Hawkins*, for the defendant. First. This sum was not an outgoing. It was not payable at the time of completion, and the defendant could not have been sued for it: *In re Boor*. (1)

Secondly. Even if a charge, it was not an incumbrance within the covenant against incumbrances, because the owner was not in default. The owner is not required to do the work himself as under s. 150 of the Public Health Act, 1875, and similar sections. The charge, therefore, was not "made, occasioned or suffered" by him within the meaning of the covenant implied by the Conveyancing Act, 1881, s. 7, sub-s. 1 (A). It is more like land tax, or a liability to repair a road ratione tenuræ, and the plaintiff takes subject to it.

Thirdly. There was no charge till the time of final apportionment, i.e., till after the conveyance.

The decisions on the Public Health Act, 1875, and Acts similar thereto, turned on two points. Under s. 150 of the Act of 1875 and similar sections the owner was in the first instance required to do the work, and it was only on his default that the urban authority could do it and recover the expenses. Again, under s. 257 and similar sections, the expenses were expressly made recoverable from "any person who is the owner of such premises when the works are completed." This was the real ground of the dictum in *Tottenham Local Board of Health* v. *Rowell* (2), and the decision in *In re Bettesworth and Richer* (3) to the effect that the charge was imposed as soon as the works were completed. *Hornsey Local Board*

(1) 40 Ch. D. 572. (2) 15 Ch. D. 378, 392.
(3) 37 Ch. D. 535.

KEKEWICH J. 1899 STOCK v. MEAKIN.

v. *Monarch Investment Building Society* (1) assumed that the point was covered by those authorities, and merely decided that the period of limitation in respect of the charge began to run from the same date.

The scheme of the Act of 1892 is entirely different, and the Act must be construed apart from the prior Acts and decisions. In the first place, s. 150 of the Act of 1875 is expressly made inapplicable. There is no owner in default, but the urban authority do the works themselves ab initio. At what time, then, does the charge attach? Sect. 6 speaks of "the premises shewn as liable to be charged in the provisional apportionment," and s. 7 speaks of "premises shewn in a provisional apportionment as liable to be charged."

At that time they are not "charged," but only "liable to be charged."

But s. 12, which deals with the final apportionment, speaks of the premises "affected thereby," and later of the "premises charged" thereunder. This shews that the final apportionment effects the charge.

Then, again, in s. 13 the words "as from the date of the final apportionment" must be read after "shall stand and remain charged," i.e., whether the apportionment is accepted or objected to, and interest runs from that date in either alternative. The council in fact only claimed interest from that date.

The whole of s. 257 of the Act of 1875 is not imported into s. 13 of the Act of 1892. The premises are merely charged to the like extent and effect, so that there is a charge on the total ownership, i.e., on the respective interest of every owner for the time being in proportion to the value of his interest: *Birmingham Corporation* v. *Baker*. (2) But the reference to the "person who is the owner of such premises when the works are completed" is not to be read into s. 13, so that the time when the charge attaches is not to be determined by such words. The result is that the council can recover the expenses, not from the owner in default, or from the owner at the time of completion of the works, but from the owner at the time

(1) 24 Q. B. D. 1, 5, 10. (2) (1881) 17 Ch. D. 782.

of the final apportionment, and from this date the charge attaches.

No reply was called for.

KEKEWICH J. The difficulty in this case arises from the habit of the Legislature of making enactments by reference to previous Acts thereby incorporated with the laudable object of shortening the statutes. Nothing, however, is more difficult than to construe an instrument which refers to other instruments, either by wholly incorporating them, or, still worse, by incorporating them with certain exceptions or modifications. That is the mainspring of the difficulties in this case.

Sect. 13 of the Act of 1892, which is the critical section, though not the only one requiring attention, refers to and obviously depends in great measure on the Act of 1875, and particularly on s. 257 of that Act, which it to some extent modifies.

The defendant's counsel met the difficulty by contending that, though it was not out of place to refer to the Act of 1875 and the decisions thereon, the Act of 1892 was in fact an independent Act, and must be construed independently. That contention is wholly inconsistent with the language of the Act of 1892. Sect. 1, which introduces the difficulty to which I have referred, enacts: "This Act may be cited as the Private Street Works Act, 1892, and shall be construed as one with the Public Health Acts, ... and this Act and the Public Health Acts may be cited together as the Public Health Acts," i.e., it constitutes a fasciculus of sections added to the Act of 1875. The two Acts and many others are to be read as one, and I cannot avoid the difficulty above referred to by adopting an independent construction for the Act of 1892.

The real question is whether the sum charged on the premises sold by the defendant to the plaintiff was so charged before the date of the contract. It does not matter in this case whether the date of the contract or the conveyance is taken, the completion of the works being anterior to both.

Expenses of this character are also charged under the Act of 1875, and the question when that charge takes effect has been

KEKEWICH J. 1899 STOCK v. MEAKIN.

discussed in several cases. It arose in *Hornsey Local Board* v. *Monarch Investment Building Society*. (1) I agree that the real question with which the Court of Appeal had to deal in that case was as to the date from which the Statute of Limitations began to run, and their judgments are directed mainly to that point; but they were obliged incidentally to consider when the charge took effect. It is true they considered it tolerably plain, but they had to express a judicial opinion thereon, and that opinion is plainly expressed in a few words by Lindley L.J. He says (2): "The conclusion of the whole matter appears to me to be this. It has been settled by this Court, in the case of *Tottenham Local Board of Health* v. *Rowell* (3), which has been followed by North J. in *In re Bettesworth and Richer* (4), that the charge is a present existing charge as from the time of the completion of the works. The actual amount, no doubt, has to be ascertained, but the charge exists." After that opinion it is impossible to say that under the Act of 1875 the charge came into existence at any other time than the completion of the works. Is that rule to be applied to the Act of 1892, or does that Act introduce exceptions thereto? There is no decision on the point under the Act of 1892, and, having regard to the passage I have just read, it seems unnecessary to refer to any other decisions on the Act of 1875 or the preceding Acts. I may say in passing that I do not consider *In re Boor* (5) of any value to either side in the present case, because it is obvious that Kay J. was discussing an entirely different question, and it has been so accepted in later authorities. Taking the decisions as establishing, as they do, the proposition of Lindley L.J., let me refer to the Act of 1892 to see in what respect the procedure and incidents thereunder differ from those of the Act of 1875, bearing in mind that the Acts are to be read as one.

No doubt one very important difference is introduced. Under the Act of 1875, and as far as I am aware under all these Acts, wherever improvements were required which the urban or

(1) 24 Q. B. D. 1.
(2) Ibid. 10.
(3) 15 Ch. D. 378, 392.
(4) 37 Ch. D. 535.
(5) 40 Ch. D. 572.

district authority had power to construct, the owner was first given the opportunity of doing the work himself at his own expense.

The Act of 1892 has reversed that procedure, and the owner has no longer that opportunity. The work must be done by the local authority, and the owner has merely to pay the expense. It has been contended that the decisions on the former Acts depended on the default of the owner in not executing the works in compliance with the requirements of the local authority. I do not follow that criticism throughout, nor do I think it of much avail on the present occasion; but it is a distinction, no doubt, and of course the point is alluded to more or less in the decided cases. Then the language of the Act of 1892 is not uniform throughout, and my attention has been called to one verbal difference which must be treated by itself.

Sect. 6, sub-s. 2 (*c*), directs the surveyor of the local authority to prepare a provisional apportionment of the estimated expenses among the premises "liable to be charged" therewith under this Act. In s. 7 the same phrase is used with reference to the provisional apportionment; the owner, who has a month during which he may object to the proposals of the urban authority, is described as the owner of the premises shewn in the provisional apportionment as "liable to be charged" with any part of the expenses. But in s. 12, which deals with the final apportionment, the phrase is changed, and the premises are spoken of as "charged," and not as "liable to be charged." It is contended that the Legislature, while making the Act of 1892 part of the Act of 1875, intended by this change of phrase to indicate that there should be no charge until the final apportionment, notwithstanding that it had been settled by a series of decisions that under the Act of 1875 the charge existed when the works were completed. That would be a strong thing to hold on the construction of the Act of 1892. It seems to me that the words "liable to be charged therewith under this Act" in s. 6, sub-s. 2 (*c*), are a mere description of the premises there spoken of. There is to be a provisional apportionment of the estimated expenses, and they are to be apportioned among the premises. What premises? Obviously,

KEKEWICH J. 1899 STOCK v. MEAKIN.

the premises which under this Act of Parliament are those properly chargeable therewith. I think that is all the phrase means, namely, a mere description of the premises. If so, the words in s. 7, "any owner of any premises shewn in a provisional apportionment as liable to be charged," are merely referential to the preceding section. One of the first things the owner may object to is that he is not liable to be charged. He may object to the proposals of the urban authority on various grounds stated in s. 7—e.g., that the alleged street or part of the street is not or does not form part of the street within the meaning of the Act, or that any premises ought to be excluded from or inserted in the provisional apportionment. He may say that house No. 1 ought to be excluded because it is not liable to be charged, or that house No. 6, which is not in the provisional apportionment, ought to be there because it is liable to be charged. That seems to me to give the words "liable to be charged" a thoroughly plain meaning, and it is not surprising to find different language in s. 12, which treats the premises as "charged." The owners' objections to the provisional apportionment have by that time been raised and decided, and, subject to the power to object to the final apportionment, it is known what premises are charged, and they are treated as "charged" and not as "liable to be charged." With those observations I pass to s. 13, which enacts that—"Any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged." It has been suggested that these words must refer to some charge before created as standing and remaining; but I think that is a little hypercritical. Every word, however, requires consideration, and possibly the section is open to more than one construction. The premises are to "stand and remain charged (to the like extent and effect as under s. 257 of the Public Health Act, 1875)." I apprehend that the reference to the Act of 1875 and s. 257 was really unnecessary. The Act of 1892 is part of the Act of 1875, and it might very well be that the charge would have been created by reference to the Act of 1875 without this parenthetic reference. But it is unnecessary to decide that point. Nor

am I disposed to decide the real meaning of the phrase "to the like extent and effect." It may mean a great many things; but there is a clear indication here that s. 257 of the Public Health Act, 1875, is to be taken as the guide in considering the charge, except so far as the Act of 1892 has expressly modified it. Now, the premises are to be charged with what? With the sums finally apportioned on them. There is not a word to indicate that the charge is to take effect from the date of the final apportionment. If the framer of this section had intended to say that, contrary to all the decisions on the Act of 1875, the charge should only take effect as from that date, nothing could have been easier than to have written "shall as from the date of the final apportionment stand and remain charged," and I cannot help thinking that any intelligent draftsman would have seen the necessity for stating in plain language and in the earliest possible part of the section the date from which the charge was to be created. That is not done. It is treated as a charge under s. 257, which, as I have already mentioned, takes effect from the date of the completion of the works. The subsequent words, "or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment," create a certain difficulty, and I do not profess to thoroughly understand them, but I think they are introduced to indicate what sum is to be charged and to carry interest. The charge is to be the sum finally apportioned, or, if objection is made against the final apportionment, the sum determined to be due as from the date of the final apportionment. The final apportionment may have been wrong. It may have been objected to and altered; and, if so, it would be wrong to say that, notwithstanding the alteration, the charge is to be that originally made in the final apportionment. That is the key to the alternative in s. 13, and, having regard to the Legislature's intention of making the Act of 1892 part of the Act of 1875, which expressed intention is the real ground of my decision, it would be giving the alternative words far too wide a meaning to hold that they were intended to alter the date from which the charge was to run. They are introduced

KEKEWICH J. 1899 STOCK v. MEAKIN.

to shew for what sum the charge is to stand. I do not think the reference to the date of the final apportionment is in connection with the interest only, but the object is to shew what sum is charged, and that sum is to be found in the final apportionment, original or altered, as the case may be. That is not giving full grammatical meaning to the words "as from the date of the final apportionment"; but I do not understand their meaning, which may be left for consideration on some future occasion. I merely decide that they do not alter the law as it stood on the construction of the Public Health Act, 1875, which law was not, I think, intended to be altered by the Act of 1892, except as therein expressly declared.

That is the short point on the construction of the Act of 1892, and, that being so, I need go no further, because, if my view is correct, it follows from the decisions, and having regard to the defendant's covenants, that this charge was existing at the date of the contract, that the defendant was bound to discharge it, and that, notwithstanding completion, he is still liable for his omission to do so. The fact that neither the defendant nor the plaintiff was aware of the charge makes no difference. The plaintiff was entitled to have the property released from the charge. He must be taken to have paid it on behalf of the defendant, and is now entitled to recover it from him.

Solicitors: *Geo. Brown, Son & Vardy; Farrer & Co.*

G. R. A.

In re ROBERT WATSON & CO., LIMITED.

KEKEWICH J.

1899 ~~ *July* 21.

Company—Shares—Mode of Payment—Filed Contract—Nature of Consideration—Statement—Sufficiency—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).

A statement of the mere form or character of the consideration of a contract filed under s. 25 of the Companies Act, 1867—e.g., the sale to the company of property the general nature of which does not appear on the face of the contract—is not a sufficient statement of the "nature of the consideration" within the rule of *In re S. Frost & Co.*, ante, p. 207.

MOTION.

This was a motion under the Companies Act, 1898, for leave to file a sufficient contract in compliance with s. 25 of the Companies Act, 1867.

The company was incorporated on August 25, 1887, with a nominal capital of 450,000*l.*, divided into thirty shares of 15,000*l.* each for the object (amongst others) of purchasing the assets of the firm of Robert Watson & Co.

By an agreement, hereinafter called the first agreement, dated September 30, 1887, and made between the then partners in the said firm of Robert Watson & Co., hereinafter called the vendors, of the one part and the company of the other part, it was agreed that—(1.) The vendors should sell and the company should purchase all and singular the lands then belonging to the said firm, the moneys, bills, notes, and other negotiable instruments and securities for money, the book and other debts and things in action belonging to the same firm, and the full benefit of all contracts to which the same firm was entitled in connection with the said business theretofore carried on by them, and also the produce and all and singular other the property and assets of every description then belonging to the same firm, including the goodwill of the said business and the right to use the trade-marks or other marks of a like nature used in connection with the said business, and to use the name of Robert Watson & Co. as part of the name of the company. (2.) Part of the consideration for the said sale should be the

KEKEWICH J.

1899

ROBERT WATSON & Co., LIMITED, *In re.*

sum of 300,000*l.*, which should be paid and satisfied as follows, that was to say: (*a*) As to the sum of 70,000*l.*, by the payment thereof in cash to the persons therein mentioned in equal shares. (*b*) As to the sum of 230,000*l.*, being the residue thereof, by the issue and allotment of twenty-three shares to the persons and in the proportions therein specified. The sum of 10,000*l.* and no more should be deemed to be paid up on each of the said twenty-three shares. (3.) As the residue of the consideration for the said sale the company should pay, satisfy, and discharge all the debts and liabilities of the vendors in relation to the said business, and should indemnify the vendors against all actions, claims, and demands in respect thereof. . . . (8) The company should, before the issue of the said twenty-three shares in respect of each of which the sum of 10,000*l.* was to be deemed to be paid up, enter into a separate agreement embodying the relevant provisions of the first agreement, and should register the same with the Registrar of Joint Stock Companies, and such registration was thereby made a condition precedent to the acceptance by the several persons therein specified of the same shares.

Another agreement, hereinafter called the second agreement, also dated September 30, 1887, and made between the company of the one part and the vendors of the other part, provided as follows: "Whereas by an agreement of even date herewith and made between the vendors of the one part and the company of the other part, the vendors agreed to sell and the company agreed to buy the property in the agreement now in recital mentioned for the consideration and upon the terms and conditions therein expressed and contained, and among others that the company should enter into the agreement hereinafter contained, now it is hereby agreed by and between the parties hereto that in fulfilment of the said condition in that behalf and in consideration of the said sale and in part payment of the purchase-money payable in respect thereof the company will immediately after the registration of these presents with the Registrar of Joint Stock Companies (which registration the company hereby undertakes forthwith to effect) issue and allot twenty-three shares of the nominal value of 15,000*l.* each in

the company to the several persons and in the several proportions hereinafter specified, that is to say" (here follows a list of the allottees and of the shares allotted to them) "and that each of the said twenty-three shares shall be registered and held by the holder thereof for the time being as having the sum of 10,000*l.* paid up thereon."

The second agreement was duly filed with the Registrar of Joint Stock Companies on September 30, 1887, before any of the said twenty-three shares were issued, but no other agreement in respect of such shares was filed.

Shortly after the filing of the second agreement all the said twenty-three shares of 15,000*l.* each were issued as paid up to the extent of 10,000*l.* per share.

By a special resolution duly passed and confirmed at extraordinary general meetings held on April 6, 1892, and April 25, 1892, it was resolved that each of the said shares of 15,000*l.*, with 10,000*l.* credited as paid up, should be sub-divided into ten shares of 1500*l.* each with 1000*l.* credited as paid up. Ten of the said shares of 1500*l.* each were now registered in the name of the respondent.

The company, who had originally considered that the filing of the second agreement was a sufficient compliance with s. 25 of the Companies Act, 1867, now moved for an order for the filing of the first agreement, or of some other contract sufficient in the opinion of the Court within the meaning of s. 1 of the Companies Act, 1898, and that it might be ordered that, upon such contract being so filed within a period to be named in such order, it might in relation to the said 230 shares of 1500*l.* each operate as if it had been duly filed with the said Registrar before the issue of the said twenty-three shares of 15,000*l.*; or, in the alternative, that a proper memorandum in writing might be filed if the Court should be satisfied that the filing of the requisite contract would cause delay or inconvenience, or be impracticable. The company was in a thoroughly solvent condition.

Warrington, Q.C., and *Armitstead*, for the applicants. The question is whether the consideration is sufficiently stated in

KEKEWICH J.

1899

ROBERT WATSON & Co., LIMITED, *In re.*

the second agreement. If not, we ask leave to file the first agreement, as the omission to file a proper contract was due to inadvertence or mistake in law. In *In re Kharaskhoma Exploring and Prospecting Syndicate* (1) the filed agreement merely referred to the prior agreement, and stated that it was agreed to allot the shares "for the considerations therein mentioned." This was held an insufficient statement of the consideration, but the degree of particularity with which the consideration must be stated was expressly left undetermined.

The true rule has now been settled by *In re S. Frost & Co.* (2), which has been affirmed by the Court of Appeal. (3) It is sufficient if the "nature of the consideration" is stated generally, and the details or value thereof need not appear. The "nature of the consideration" must mean the nature of the transaction. In the present case the second agreement states that the transaction was one of sale and purchase, and the agreement is made "in consideration of the said sale." The nature of the consideration is, therefore, sufficiently stated within the rule. The agreement could certainly be sued on.

C. T. Musgrave, for the respondent. The judgment of Romer J. in *In re S. Frost & Co.* (2) was approved by Wright J. in *Markham and Darter's Case*. (4) Wright J. says (5): "I understand him to mean that if the real nature of the consideration is disclosed, that may be enough, although the details can be ascertained only by other evidence; and I adopt that view."

KEKEWICH J. It is my anxious desire to follow the guidance of the Court of Appeal in *In re S. Frost & Co.* (3), and not less so as they did not adopt the view I took in *In re Maynards*. (6) The only difficulty in testing any particular document is to ascertain what the view of the Court of Appeal really was.

I understand that the view expressed by the Court of Appeal in *In re Kharaskhoma Exploring and Prospecting Syndicate* (1), by Romer J. in *In re S. Frost & Co.* (2), by Wright J. in *Markham and Darter's Case* (4), and again by the Court of Appeal in

(1) [1897] 2 Ch. 451.
(2) [1898] 2 Ch. 556.
(3) Ante, p. 207.
(4) [1899] 1 Ch. 414 [affirmed on appeal, ante, p. 480].
(5) Ibid. 429.
(6) [1898] 1 Ch. 515.

In re S. Frost & Co. (1), amounts to this: The "nature," "kind," or "sort" of consideration, or, as Wright J. puts it, "the real nature" of the consideration, must be stated on the face of the contract. In this proposition all these authorities concur. But the difficulty is to know what the phrase "nature of the consideration" means. I only mention that phrase as the other phrases used, though expressed in slightly different language, amount to the same thing.

In the particular case the consideration is only stated in the following manner. The filed contract recites that by an agreement of even date therewith the vendors agreed to sell and the company to buy "the property in the agreement now in recital mentioned." Now, unless the applicants' argument is sound, that is not sufficient, as in *In re S. Frost & Co.* (1) Vaughan Williams L.J. expressly says (2): "It would not be a sufficient statement of consideration to refer to another document in which a statement of the consideration may be found"; and the other members of the Court of Appeal did not differ from him. It is not therefore enough to describe the property as "the property in the agreement now in recital mentioned."

But the applicants contend that the phrase "nature of the consideration" points, not to the nature or character of the property dealt with, but to the form or character of the transaction.

In the present case there is a plain statement that the form of the transaction is that of sale and purchase. The reader of the document can see that it is a sale and purchase and not an exchange, and the argument put forward rests entirely on the contention that that is a sufficient statement of the real nature of the consideration.

I do not think that was the meaning of the Act of 1867 or the decisions.

In their judgments in *In re S. Frost & Co.* (1) the Court of Appeal agree with the decision of Romer J. (3) except as to a point on the Statute of Frauds, with which I am not concerned.

(1) Ante, p. 207. (2) Ante, p. 216. (3) [1898] 2 Ch. 556.

KEKEWICH J.
1899
ROBERT WATSON & Co., LIMITED, *In re.*

Romer J. says (1): "Now, fairly viewed, is the consideration stated on the face of the filed document in the case before me? I think it is. The document shews that the consideration was (stating it shortly) that the vendor had agreed by a previous contract therein mentioned (but not filed) to sell and lease to the company certain leasehold premises, and to sell the goodwill of the business carried on by the vendor on those premises, together with the machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with those businesses as therein mentioned. That is a short but, to my mind, sufficient statement of the consideration, and I do not think it was essential that the full particulars of the leasehold businesses and plant should be detailed in the filed contract." He goes on to point out that if more particularity were necessary an inventory might be required, and with this the Court of Appeal agree. Having evidently in his mind the distinction between a general description and a detailed schedule, he says in effect that the former is sufficient, and that to require the latter would lead to absurdity.

So again illustrations of the sort of particularity required are given by Chitty L.J. in *In re Kharaskhoma Exploring and Prospecting Syndicate.* (2) He says: "If the consideration is, for instance, a concession in South Africa, the person who reads the registered document will see that it is a concession in South Africa, and will form his own opinion about it." The next illustration is very pointed: "So if it is furniture supplied to an hotel company, he may be able to go at once and see what that furniture is, or he may not, because after a lapse of time the furniture may be worn out." He implies that an inquiring person may decide for himself whether the furniture is worn out or not. He continues: "Again, if it is the sale of a goodwill and stock-in-trade, the consideration stated being the goodwill and the stock-in-trade, he sees the nature of the consideration, and he sees it stated."

Now a person reading the filed contract in this case cannot see the nature of the consideration within the meaning of those authorities. The consideration is only stated to be the sale

(1) [1898] 2 Ch. 560. (2) [1897] 2 Ch. 451, 468.

and purchase of property, which may be freehold, copyhold, or leasehold, or anything else that may be fairly described as property. I do not think the Court of Appeal in deciding *In re S. Frost & Co.* (1) intended to hold that there need be no statement at all as to the nature of the property dealt with.

In the present case the general nature of that property can only be determined by referring to another document which is not filed.

The filed contract was therefore insufficient within the rule of Vaughan Williams L.J. above referred to.

[His Lordship then heard the evidence, and in the result ordered the first agreement to be filed within one month subject to leave to insert a longer time in drawing up the order.]

Solicitors: *Freshfields & Williams.*

G. R. A.

In re WALLIS AND BARNARD'S CONTRACT.

[1899 W. 1501.]

Vendor and Purchaser—Title—Practice—Summons—Jurisdiction—Contract—Validity—Mistake—Rescission — Right to obtain — Undisclosed Restrictive Covenants—Form of Conveyance—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.

A general declaration as to title ought rarely to be made on a vendor and purchaser summons, that procedure being only intended for the decision of isolated points arising out of or connected with the contract.

Criticism of the existing practice in this respect.

An isolated point on the form of the conveyance may be dealt with on a vendor and purchaser summons, although the respondent may have a right to obtain rescission of the contract on the ground of mistake. Such a right to obtain rescission does not give rise to "a question affecting the existence or validity of the contract" within the meaning of the Vendor and Purchaser Act, 1874, s. 9.

A purchaser is entitled to a conveyance subject only to the restrictive covenants mentioned in the contract, although he has notice of others.

VENDOR AND PURCHASER SUMMONS.

By an indenture dated April 23, 1895, and made between the

(1) Ante, p. 207.

KEKEWICH J. 1899 WALLIS AND BARNARD'S CONTRACT, *In re.*

vendor of the first part, a mortgagee of the second part, and the purchaser of the third part, the mortgagee and the vendor demised certain premises at Chandler's Ford, Hants, bounded on the north by Valley Road, on the south by Brownhill Road, and on the east and west as therein mentioned, to the purchaser for twenty-one years from March 25, 1895; and it was agreed that, if the purchaser should before January 1, 1900, give to the mortgagee, his heirs or assigns, six calendar months' notice of his desire to purchase the fee simple of the premises thereby demised, then the mortgagee, his heirs or assigns, should, on the expiration of such notice and upon payment of the sums therein mentioned, assure the said premises, subject to the restrictive covenant to erect only two houses to face Valley Road and two houses to face only (1) Brownhill Road, unto the purchaser for an estate in fee simple in possession free from incumbrances.

The mortgage was subsequently paid off and a proper reconveyance made to the vendor.

On September 29, 1898, the purchaser gave written notice of his desire to purchase the fee simple of the premises; and subsequently submitted a draft conveyance containing the above restrictive covenant.

The vendor, however, insisted that she was entitled to the insertion of a covenant that the purchaser, his heirs or assigns, would not "permit any of the buildings erected or to be erected on the said parcel of ground or any part thereof to be used as or for a hospital, theatre, or like place of public resort, or for a lunatic asylum, or for a public-house, beershop, or hotel, or for the sale of any beer, spirits, or other intoxicating liquors, or for any other purpose whatever other than that of a private or professional residence."

On April 28, 1899, the purchaser took out this summons asking for—(1.) a declaration that he was entitled to a conveyance of the premises free from all incumbrances except the restrictive covenant specifically mentioned in the contract constituted by the said indenture and notice, and in particular free from the covenant in dispute; or (2.) a declaration that he was

(1) *Sic.*

entitled to compensation if it should turn out that the premises were in fact subject to any restrictive covenant not specifically mentioned in the contract. No notice of the covenant in dispute appeared in the abstract; but the vendor alleged that the Chandler's Ford estate or Brownhill Park estate, of which the premises formed part, had to the knowledge of the purchaser been developed under a common building scheme including such covenant.

It appeared that by an agreement made September 27, 1893, between the vendor of the one part and David Faber of the other part, it was agreed that the vendor should grant and Faber should accept a lease of a certain piece of land containing one acre, part of the said estate, for the term of 1000 years from the date of the agreement, at the yearly rent of 20*l.*; and that as soon as a provisional licence for the sale of beer and spirits should have been obtained, Faber should erect an hotel on the said land, and that Faber should be entitled at any time within twenty-one years from the date of the agreement to take a further piece of land, part of the said estate, containing half an acre, at a site to be agreed on suitable for another inn, at the rent of 10*l.* per annum, and that the vendor should not permit any inn, public-house, or beerhouse, or house for sale of beer or spirits, to be erected or used upon her said estate at Chandler's Ford aforesaid, except the said houses to be erected by Faber or any others he might erect or take on the said estate, it being part of the consideration for the agreement that Faber should have the exclusive right to all licences for the sale of beer and spirits used and sold on the said estate, and that the vendor in all leases or sales made or to be made by her of any part of her said estate, except to Faber, should provide that the leases or conveyances should contain covenants on the part of the lessees or purchasers not to use the property taken by them for the purpose of an inn or public-house, or for the sale of any beer or spirits.

For the purpose of carrying out this undertaking on the part of the vendor, forms of covenant were prepared which were to be inserted in all leases and conveyances. The forms included a covenant to the effect that the lessee or purchaser

KEKEWICH J. 1899 WALLIS AND BARNARD'S CONTRACT, *In re.*

would not permit any of the buildings erected or to be erected on the part of the estate demised or conveyed to him, or any part thereof, to be used as or for the sale of beer, spirits, or other intoxicating liquors, or for a hospital, theatre, or like place of public resort, or for a lunatic asylum, or for any other purpose whatever other than that of a private or professional residence, without the previous licence in writing of the mortgagee and the vendor.

It was alleged that in 1894 and 1895, while negotiating for leases and conveyances of other parts of the estate, the purchaser had obtained notice of the alleged building scheme and the above restrictive covenant.

Among other documents, certain building agreements with the purchaser were produced with a scheduled form of lease containing a covenant to the effect above stated. Two of these were dated April 23, 1895, and related to plots immediately adjoining the premises now in question. The purchaser, however, denied the existence of any such building scheme as alleged, and pointed out, as the fact was, that no common form of conveyance or lease had in fact been adopted or adhered to, but that the covenants therein had been varied or modified to suit the circumstances of each particular case and the convenience of purchasers and lessees, and were subject to the vendor's licence. He also denied all knowledge of the restrictive covenant in the agreement with Faber until it was disclosed in the preparation of the conveyance.

Renshaw, Q.C., and *R. J. Parker*, for the purchaser. The contract expressly provides that the premises shall be assured subject to a specific restrictive covenant. The existence of another restrictive covenant, even if known to the purchaser, which is denied, is immaterial. The purchaser is entitled to a conveyance on the terms of the contract, and is not bound to have any other restrictive covenant inserted in the conveyance: *Cato* v. *Thompson* (1); *In re Gloag and Miller's Contract* (2); *Phillips* v. *Caldcleugh*. (3)

(1) (1882) 9 Q. B. D. 616. (2) (1883) 23 Ch. D. 320, 327.
(3) (1868) L. R. 4 Q. B. 159.

Warrington, *Q.C.*, and *G. Broke Freeman*, for the vendor. Such a conveyance would be a breach of contract with Faber. The purchaser is practically seeking specific performance of the contract. The Court will not grant specific performance of a contract involving a breach of a prior contract: *Willmott* v. *Barber*. (1)

Again, the omission of the covenant from the contract was obviously due to a mistake on the vendor's part, i.e., a unilateral mistake. The remedy is rescission, unless the purchaser elects to have rectification: *Paget* v. *Marshall*. (2) This question affects the validity of the contract in its inception, and cannot be decided on a vendor and purchaser summons.

No reply was called for.

KEKEWICH J. The opportunity of again making some remarks on the Vendor and Purchaser Act, 1874, is not ungrateful to me, because I entertain a strong opinion that our practice has been drifting into a mischievous channel. The Act was passed in order to enable parties to raise and have decided in a summary way some of the questions which occurred in actions for specific performance often long postponed in hearing, and perhaps only finally decided on further consideration. The Act says that either a vendor or purchaser "may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract,"—I skip the words in a parenthesis—"and the judge shall make such order upon the application as to him shall appear just." The whole frame of that section points to raising in a summary way distinct isolated points, and not the general question whether the vendor has a good title. I need not comment on the section in detail, but I observe that the vendor or purchaser "may at any time or times and from time to time apply," so that the vendor may raise one point and then the purchaser another, and so on, if difficulties arise in the completion of any particular purchase. That was the object of

(1) (1880) 15 Ch. D. 96. (2) (1884) 28 Ch. D. 255.

KEKEWICH J.

1899

WALLIS AND BARNARD'S CONTRACT, *In re.*

the Act, and for a very long period it was worked on those lines; but lately we have drifted into an entirely different practice. Summonses are issued for a declaration that the vendor has shewn a good title, or has not shewn a good title. Requisitions are handed up without any information as to what has or has not been answered, or what the real question is, leaving that information to be supplied by counsel.

Worse than that, orders have been made by judges (including myself under compulsion) declaring that a vendor has or has not shewn a good title, i.e., embracing the whole title, instead of dealing with isolated questions. Such a declaration was intended by the Act to be left, and in a large number of cases had better be left, to a specific performance action.

I must speak with bated breath of *In re Scott and Alvarez's Contract* (1), because it is a case of my own in which the Court of Appeal did not entirely agree with me. I thought the vendor had not made out a title. The Court of Appeal were satisfied on the evidence before them that the vendor had made out a title of the most delicate character, namely, a possessory title. The result was that the purchaser's solicitor advised him not to complete, and a specific performance action followed and failed. This instance shews that the present practice is mischievous. It would be a great improvement to restrict these applications to isolated questions, and that the summons should always state precisely what the question is, e.g., that the vendor has not proved some one's seisin, or the execution of a disentailing assurance.

Now there are two questions which are saved from the operation of the Act. One is "a question affecting the existence of the contract." I need not dwell upon that, because nobody says there is not a contract here. The other is "a question affecting the validity of the contract." The vendor says in effect, "I entered into the contract under a mistake, which, though not induced by the purchaser, would enable me to rescind the contract by a proper action." How is that a question affecting the validity of the contract? The contract is and will remain valid until rescinded by the Court. It

(1) [1895] 1 Ch. 596; 2 Ch. 603.

cannot be got rid of in any other way. That is not a question affecting the validity of the contract within the Act, and the Act therefore applies.

The summons here is properly framed, asking the Court to decide whether there shall or shall not be a particular covenant in the conveyance, and not asking to have the conveyance settled generally. That is a point properly raised, and which I can properly dispose of. It arises in this way. The contract contains a certain restrictive covenant; but it does not contain that which the vendor seeks to insert. The vendor is, no doubt, in a difficult position. She has entered into another contract, which is likely enough to be broken if the conveyance is made as the purchaser requires. Here another novelty in practice must be mentioned. Originally the Court used to decide simply the questions between the vendor and purchaser, which, I believe, was the intention of the Act. Lately, in more than one instance, the Court has avoided deciding the real question, saying judicially that it is a doubtful point, and that the title cannot be forced on a purchaser. That is really deciding an action for specific performance. It is done again and again. I regret to say I have done it myself, as I am here only to administer the practice of the Court; but I think it is a very dangerous practice, because the whole case is not exhaustively treated on a vendor and purchaser summons; and if, as in *In re Scott and Alvarez's Contract* (1), it is fully gone into in a later proceeding, a very different state of facts may appear. As at present advised, if I were trying an action for specific performance, I do not think I should hold the vendor bound to convey the property to the purchaser in the form he requires, when she might be liable the next day to an action on the covenant to which I have referred. That is not the point I am asked to decide. I am asked to decide whether, in pursuance of this contract, which for this purpose it is assumed is about to be performed, the conveyance shall be in one form or another. Except as to this point, the draft conveyance has been settled, and the rights of the parties crystallized. All I have to decide is whether the conveyance

(1) [1895] 1 Ch. 596; 2 Ch. 603.

KEKEWICH J. 1899 WALLIS AND BARNARD'S CONTRACT, *In re.*

shall or shall not contain the covenant the vendor insists upon. That point it is open to me to decide, and there is not much room for doubt about it.

The vendor has contracted to sell on a certain event in a certain manner, and to make a title of a certain character, without raising or reserving any question as to the existence or non-existence of any restrictive covenant other than that specifically mentioned in the contract. Under those circumstances, as decided in *In re Gloag and Miller's Contract* (1), the purchaser is entitled to a conveyance according to the terms of the contract. Against that conclusion it is urged that, though according to the contract the conveyance must be in a certain form, the purchaser had previous notice of a building scheme, or was otherwise bound to recognise the covenant which the vendor had entered into, and in equity took subject to that liability. The answer is that the purchaser would be no better off in that respect when he got his conveyance than before. His liability, if any, under the covenant depends, not on its inclusion in the conveyance, but on his notice of its existence. If there is a building scheme under which the covenant in question is enforceable by other purchasers, it may be enforced notwithstanding the form of the conveyance. All I decide is that, in settling the conveyance to be executed in pursuance of this contract, the existence of which is not denied and the validity of which is not in question, the conveyance must be in a certain form—that is to say, in the form in which the purchaser has prepared it. There will be a declaration in accordance with the first paragraph of the summons.

Solicitors: *Geare & Pease, for Bowker & Sons, Winchester; Peacock & Goddard, for Sharp & Brain, Southampton.*

(1) 23 Ch. D. 320, 327.

G. R. A.

THOMSON *v.* LORD CLANMORRIS.

KEKEWICH J.

[1898 T. 2006.]

1899

July 26, 27.

Statute of Limitations—Action by Shareholder for Compensation in respect of Untrue Statement in Prospectus of Company—Directors' Liability Act, 1890 (53 & 54 *Vict.* c. 64), s. 3—*Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, c. 42), s. 3.

The provision of s. 3 of the statute 3 & 4 Will. 4, c. 42, whereby "all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force" are required to be brought within two years after the cause of action, refers to actions for penalties, or damages or sums of money in the nature of penalties, and does not apply to an action by a shareholder against the directors of a company to recover, under the Directors' Liability Act, 1890, compensation for loss or damage sustained by him by reason of an untrue statement in the prospectus of the company on the faith of which he subscribed for shares.

THIS action was brought by Joseph Thomson as plaintiff against the defendants the Right Honourable Lord Clanmorris, Colonel A. Bravo, B. C. Hargreaves, J. Kenneth D. Mackenzie, and J. W. Wilson as directors of the British Goldfields of West Africa, Limited, and the defendant Sir Alfred Kirby as the promoter of the same company, claiming compensation under the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), for loss or damage sustained by the plaintiff by reason of untrue statements in the prospectus of the company on the faith of which the plaintiff subscribed for shares in the company.

By his statement of claim the plaintiff alleged that the prospectus contained divers untrue statements, and in particular a statement that the company had been formed to acquire and work valuable concessions for gold, timber, &c., in the district of Appolonia, in the Gold Coast Colony, of about 7000 square miles in extent, whereas the total area of the land conceded was in fact about 600 square miles or thereabouts.

On the faith of the statements contained in the prospectus the plaintiff, on or about August 28, 1895, applied to the company for 100 shares in the company, and paid the sum of 12*l.* 10*s.* to the company, being 2*s.* 6*d.* per share due on

KEKEWICH J.

1899

THOMSON v. LORD CLANMORRIS.

application in accordance with the terms of the prospectus. On or about August 29, 1895, the company, in pursuance of the application, allotted 100 shares in the company to the plaintiff, and the plaintiff on September 7, 1895, paid to the company the further sum of 37*l.* 10*s.*, being the amount owing on allotment. On December 17, 1895, the plaintiff paid to the company the further sum of 25*l.*, being the first call of 5*s.* per share, and on November 29, 1898, he paid to the liquidator of the company the sum of 25*l.*, being the final call of 5*s.* per share, these sums making together the sum of 100*l.*

The writ in this action was issued on December 9, 1898.

The defendants Clanmorris, Bravo, Hargreaves, and Wilson by their statement of defence denied the allegations contained in the statement of claim, and by way of further defence alleged that the action was not commenced within two years after the plaintiff's cause of action (if any) arose, and that the claim was barred by the statute 3 & 4 Will. 4, c. 42, s. 3. (1)

The defendant J. Kenneth D. Mackenzie by his defence craved leave to refer to the defence of the last-mentioned defendants, and to repeat the same as his defence in this action.

(1) The section is as follows: "That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after: provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

The defendant Sir Alfred Kirby did not appear in the action.

Upon the trial of the action evidence was given in support of the allegations contained in the statement of claim, and the question (upon which alone the case is here reported) whether the statute of 3 & 4 Will. 4, c. 42, s. 3, applied to such an action as the present one, was argued.

Renshaw, Q.C., and *George Henderson*, for the plaintiff. The provision in the statute 3 & 4 Will. 4, c. 42, s. 3, to the effect that "all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force" must be brought within two years after the cause of action, has no application to an action for compensation under the Directors' Liability Act, 1890, but is limited to actions for penalties or damages or sums in the nature of penalties. The Act of 1890 does not confer a right of action for a penalty or for damages or for a sum of money in the nature of a penalty given to the party grieved, but enacts that every person who is director of a company at the time of the issue of a prospectus inviting persons to subscribe for shares, and every promoter, "shall be liable to pay compensation to all persons who shall subscribe for any shares . . . . on the faith of such prospectus . . . . for the loss or damage they may have sustained by reason of any untrue statement in the prospectus." The plaintiff's right of action is, therefore, a statutory right to sue for "compensation," and to such an action the statute 3 & 4 Will. 4, c. 42, s. 3, is not applicable.

[They referred to *Robinson* v. *Currey*. (1)]

Warrington, Q.C., and *T. Willes Chitty*, for the defendants Clanmorris, Bravo, and Hargreaves; and

Warmington, Q.C., and *T. Willes Chitty*, for the defendant Wilson. The statute 3 & 4 Will. 4, c. 42, s. 3, applies to this case, and, the action not having been brought within two years after the shares were subscribed for, the plaintiff's claim is barred. The action for statutory compensation under the Directors' Liability Act, 1890, is in substance an action for

(1) (1881) 7 Q. B. D. 465.

KEKEWICH J. 1899 THOMSON v. LORD CLANMORRIS.

damages given by that statute to the party grieved, and is, therefore, within the express words of 3 & 4 Will. 4, c. 42, s. 3. See Darby and Bosanquet on the Statute of Limitations, 2nd ed. p. 512. In Mayne on Damages, 6th ed. p. 596, referring to the statutes of 8 Hen. 6, c. 9, s. 6 (repealed by 42 & 43 Vict. c. 59), 43 Eliz. c. 2, s. 19 (repealed by 26 & 27 Vict. c. 125), and 2 W. & M. Sess. 1, c. 5, instances are given of actions for double or treble damages. It cannot be doubted that 3 & 4 Will. 4, c. 42, s. 3, would afford a good defence to such an action, and why should it not apply to this case also? It is said that the Act of 1890 does not use the word "damages," but the word "compensation"; but damages are compensation. The measure of damages in an action of tort is the compensation for the injury done to the plaintiff by the wrongful act of the defendant. The statute 3 & 4 Will. 4, c. 42, s. 3, applies in terms to future Acts of Parliament, and, therefore, must extend to actions under the Directors' Liability Act, 1890.

The defendant Mackenzie appeared in person.

Renshaw, Q.C., in reply. In every one of the instances referred to in Mayne on Damages, the damages given are in the nature of penalty or punishment. The 3 & 4 Will. 4, c. 42, s. 3, refers, not to sums of money recoverable by force of a statute, but to damages or sums of money "given to the party grieved" as distinguished from penalties or sums of money given to the Crown, or sums of money which are not given directly by statute to the party grieved. In *Robinson* v. *Currey* (1) Bramwell L.J. says (2): "A party grieved is not brought into existence by the statute which gives him a penalty, he is a person who is supposed to exist, and the statute is passed on account of his grievance, and the action for penalty is given to him. There may be cases in which the statute states who is the party grieved, as where it says that A. B. shall be deemed a party grieved, but a party grieved is a person who exists, and on account of his existence and grievance the statute gives him a remedy." He is speaking throughout of an action for penalty. And to the same effect are the judg-

(1) 7 Q. B. D. 465. (2) 7 Q. B. D. 470.

ments of the other judges and the argument referring to *Guardians of the Poor of St. Leonard's, Shoreditch* v. *Franklin*. (1) It has always been the policy of the Legislature (see, for example, 31 Eliz. c. 5, s. 5, repealing 7 Hen. 8, c. 3; Darby and Bosanquet, 2nd ed. pp. 511 et seq.) strictly to limit the time within which actions for penalties may be brought, but it has never been the policy so to limit an action for damages for a wrong done to an individual or to the community. The Act of 1890 is not an Act to punish for a wrong done by inflicting a penalty to be paid to an individual aggrieved, and no one reading that Act by itself would dream that there was any limit of so short a duration as two years to the right to recover the compensation given by the Act.

But, supposing that the statute does apply, the question is when time under it begins to run. The cause of action arose, not when the plaintiff subscribed for the shares, but when he suffered loss. The last payment made by the plaintiff was of the sum of 25*l.* in November, 1898, and as regards that sum at all events his claim is not barred.

KEKEWICH J., after dealing with the facts of the case, and coming to the conclusion that in respect of the misstatement as to the area of the land conceded the plaintiff had made out a case under the Directors' Liability Act, 1890, continued as follows:—Then comes the point of law as to the application of the statute of 3 & 4 Will. 4, c. 42, s. 3. I waited for Mr. Warmington's comments in the hope that he would be able to refer me to some authority bearing on the point. It appears that there is not any, and it is a point which certainly is not very much cleared up, though it is illustrated, by the case of *Robinson* v. *Currey* (2)—the only decision on the meaning of the Act which has been brought to my attention. The Directors' Liability Act, 1890, enacts by s. 3 that "every person who is director of the company at the time of the issue" of a prospectus inviting persons to subscribe for shares "shall be liable to pay compensation to all persons who shall subscribe for any shares . . . . on the faith of such

(1) (1878) 3 C. P. D. 377.

(2) 7 Q. B. D. 465.

KEKEWICH J. 1899 THOMSON v. LORD CLANMORRIS.

prospectus . . . . for the loss or damage they may have sustained by reason of any untrue statement in the prospectus." Now, it is to be observed that the section does not confer upon the injured person a right of action for damages. He is to have compensation, something which will give him back what he has lost by reason of the prospectus of which he complains. That is the Act. But it is said that under s. 3 of 3 & 4 Will. 4, c. 42, he must bring his action within two years, because this is an action for a penalty, not for damages to be recovered by the plaintiff, but for a sum of money given to a person aggrieved. It is to be observed, in the first place, that the statute says that "all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force" must be brought within two years after the cause of such action, and the question is whether this is an action within that section. It is also to be observed that the section is not confined to actions of that character, but deals with actions of debt for rent, actions of covenant or debt upon any bond or other specialty, actions of debt or scire facias upon any recognizance, actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias. They are grouped together, but these particular actions by the party grieved are to be brought within two years. As Mr. Renshaw has pointed out in reply, it has been the policy of the Legislature to require that actions for penalties should be brought with promptitude, and to that end it has enacted that they must be brought within a much shorter period than is allowed for actions of debt, covenant, and so forth. In the first place, although the words "damages or sums of money given to the party grieved" occur in the statute, yet they are connected with a reference to actions for "penalties," and I think that this part of the section is aimed at actions for penalties, and means damages or sums of money in the nature of penalties, and not sums of money such as we are dealing with here, representing compensation for loss suffered by persons who have subscribed for shares on the faith of untrue statements in a prospectus. It seems to me that in

the absence of clear words I ought not to hold that the Legislature, having in the Act of 1890 given a new remedy to a new class of persons, intended to subject these actions to the special statutory limitation imposed by the Act of 3 & 4 Will. 4. I have looked at *Robinson* v. *Currey*. (1) There is contained in that case a great deal of learning on the subject of a most interesting character, but, though it deals at some length with the position of the party grieved, it does not really touch the point which I have now to consider. I do, however, find that all the learned judges in the Court of Appeal in that case refer to penalty throughout, as if they regarded the statute as dealing with penalties or damages in the nature of penalties. That, I think, is the true construction of the section, and the consequence is that it affords no defence to this action.

As this case may go further, I think it is convenient that I should deal with the question which has been raised as to the time when the cause of action arose. It did not commence with the prospectus. It did not commence with the subscription for shares. As I have pointed out, the right of action given by the Act of 1890 is not a right to recover damages accruing by reason of an untrue statement. When once the plaintiff subscribed for his shares he became liable to pay the money by certain instalments; but the compensation given by the statute is not for the liability, but for the loss, and he did not incur the loss until he paid the money. Therefore, as regards the ultimate 25*l.* which was not paid until November, 1898, he would not be within the prohibition of the statute of William IV. even if that statute applied. The result would be that he would recover, not the 100*l.*, but only the 25*l.*, and the reason why I refer to it is because I propose to give judgment for the plaintiff with costs; and if I felt compelled to say that he could not maintain the action for the 100*l.*, but only for the 25*l.*, I should still give him the whole costs of the action.

Solicitors: *Herbert Toomer; Morten, Cutler & Co.; Godfrey, Webb & Godfrey.*

(1) 7 Q. B. D. 465.

C. C. M. D.

KEKEWICH J.
1899
Aug. 4.

In re KELCEY.
TYSON *v.* KELCEY.

[1898 K. 1006.]

Mortgage (General)—Charge—"All my Real and Personal Estate"—Uncertainty—Public Policy—Validity.

A general charge for value on all the existing property of the mortgagor is not void for uncertainty if the property to which it attaches can be ascertained at the time of enforcement. Such a charge is not contrary to public policy.

SUMMONS.

THIS was a summons in a creditors' action for the administration of the estate of the testator, Francis Finn Kelcey, formerly Francis Finn, who died insolvent. The applicant, a defendant in the action, claimed to be a secured creditor under the following memorandum of charge:—

"Memorandum made this 10th day of November, 1869.

"That I the undersigned Francis Finn, of Peene in the parish of Newington next Hythe, in the county of Kent, farmer and grazier, do hereby charge all my real and personal estate whatsoever and wheresoever and of what nature or kind soever the same may be or consist with the payment to Sarah Anne Foord of Smeeth, in the said county of Kent, widow, of the sum of 2500*l.* this day lent and advanced by her to me, and secured by my promissory note bearing even date herewith together with interest for the same at the rate of 4*l.* 10*s.* per cent. per annum. And I do hereby undertake and agree that I will when thereunto required make and execute all such deeds and assurances as shall be reasonable and necessary for charging the said premises with or further securing the repayment of the said sum of 2500*l.* and interest as aforesaid. As witness my hand the day and year above written.

"F. Finn."

The debt was reduced to 500*l.* in the testator's lifetime, and all interest was paid up to September 1, 1897.

The testator died on September 12, 1898, and, on November 5, 1898, letters of administration with the will annexed were granted to the defendant Stephen Finn Kelcey.

At the date of the above memorandum the testator was entitled to a policy of assurance for 1000*l.* on his own life.

On November 18, 1898, notice of the memorandum of charge was given to the assurance company on behalf of the applicant. The policy was otherwise unincumbered, and the amount now due thereon was 1214*l.* 17*s.* 1*d.* It had not been paid owing to the applicant's notice.

The administration action was commenced on December 15, 1898.

On April 10, 1899, the applicant took out the present summons to assert her claim.

J. G. Wood, for the applicant. This is a good charge on the policy. Whatever may be the effect of a charge on all a man's future property, there is no doubt that a charge on all his present property in consideration of a substantial present advance is valid.

Warrington, Q.C., and *H. C. Hull*, for the plaintiffs. The charge is not confined to present property, and in any case it is too vague and indefinite to be enforced.

The subject-matter of the charge must be ascertained when the Court is asked to enforce it: *In re Clarke*. (1) That was a case of a charge on future property, but the principle is equally applicable to a charge on present property. *Belding* v. *Read* (2) and *In re Count D'Epineuil* (3), which drew a distinction between present and future property in this respect have been overruled by *Tailby* v. *Official Receiver*. (4) In the present case, with the exception of the policy, the subject-matter of the charge is not ascertained. Secondly, it is against public policy to enforce a charge extending to every item of the mortgagor's property even to the clothes on his

(1) (1887) 36 Ch. D. 348.
(2) (1865) 3 H. & C. 955.
(3) (1882) 20 Ch. D. 758.
(4) (1888) 13 App. Cas. 523.

KEKEWICH J.

1899

KELCEY, *In re.* TYSON *v.* KELCEY.

back, preventing him from paying his debts and depriving him of the means of subsistence. Such an objection was alluded to in *In re Clarke* (1), *In re Count D'Epineuil* (2), and *In re Turcan*. (3)

In *In re Count D'Epineuil* (2) the mortgagor charged all his present and future personalty, and Fry J. held the charge good as to the present personalty only. But in *Tailby* v. *Official Receiver* (4) Lord Macnaghten says (5): "As for the order made in *In re Count D'Epineuil* (2), it seems to me to have been only too favourable to the claimant. I much doubt whether a memorandum like that on which the claimant relied could create a specific lien of any sort or kind." Such a charge is also objectionable on the ground of its secrecy, which enables a fictitious credit to be maintained, and as the charge affects real estate a purchaser or mortgagee may be prejudicially affected.

Bardswell, for another defendant creditor.

Gatey, for the administrator.

No reply was called for.

KEKEWICH J. Notwithstanding the novelty of the point, in the sense of absence of decision, I do not think that any useful purpose would be answered by further consideration or argument. I say novelty in the sense of absence of decision, because, though the point has been discussed again and again as an abstract question, it has never been decided whether a mere charge for valuable consideration on all the real and personal property of the person receiving the consideration is good, so as to be enforceable in a court of law or equity.

In this case, I think, we are free from any question whether future property is included or not. Though there are some words that might be construed to include future property, the words as a whole seem to me to point more directly to property existing at the date of the charge only. The operative words are: "I . . . . hereby charge all my real and personal estate

(1) 36 Ch. D. 352, 354, 358.
(2) 20 Ch. D. 758, 760.
(3) (1888) 40 Ch. D. 5, 9.
(4) 13 App. Cas. 523.
(5) 13 App. Cas. 544.

whatsoever and wheresoever and of what nature or kind soever the same may be or consist," and I do not think that what follows can fairly be construed to enlarge what in itself would be confined to existing property.

Now, why should not that be a good charge on what the testator had at the time? The first argument is based on the vagueness and indefiniteness of the charge. The answer to that seems to me to be found in the judgment of Bowen L.J. in *In re Clarke* (1): "A contract may be so vague in its terms that it cannot be understood, and in that case it is of no effect at law or in equity." There is no vagueness in that respect in this particular contract, unless it is found in the doubt whether future property is to be included or not, and even that comes under the second head. About that Bowen L.J. says: "There is another kind of vagueness which arises from the property not being ascertained at the date of the contract, but if at the time when the contract is sought to be enforced the property has come in esse and is capable of being identified as that to which the contract refers, I cannot see why there is in it any such vagueness as to prevent a court of equity from enforcing the contract. Even then there may be something in the nature of the contract which will prevent its being enforced. I will not attempt to define what will have that effect. It is suggested that, as distinct from vagueness, there may be such wideness in a contract that it ought not to be enforced by a court of equity"; and then he just hints at the suggestion which is the basis of the second argument. But after those remarks, I think clearly that a contract of this kind cannot be attacked upon the ground of indefiniteness. If it is possible to discover its meaning by construction, and to ascertain when the time for enforcement comes to what property the charge attaches, it cannot be said that it ought not to be enforced because it is too vague, or even because there might have been a difficulty in ascertaining the property at the time of the creation of the charge.

The second argument was that the charge is contrary to public policy—that is to say, that it is not desirable that a

(1) 36 Ch. D. 355.

KEKEWICH J.

1899

KELCEY, *In re.* TYSON *v.* KELCEY.

man should be allowed to charge everything he has, down to the clothes on his back, or to create such a charge, in secret, so that he might be trading under false colours, carrying on business, or keeping up an establishment when all the time a stranger had in his pocket a charge which would sweep up the whole of his property.

To that argument there seems to me to be two complete answers: the first is that one can never too much or too forcibly keep before one's mind, when this question is raised, the judgments in *Egerton* v. *Earl Brownlow* (1), which are of some age, or the well-known dictum of Burrough J. in the earlier case of *Richardson* v. *Mellish* (2), to the effect that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you." The argument from public policy seems to me to go a great deal too far in this case. There is certainly no law that a man may not create a charge on all his real and personal property. He may do so by proper deeds in a proper way; it may be that a registered bill of sale or other documents are necessary; but it can be done. And to say that that which can lawfully be done in one way cannot be done in a different way, because it is against public policy, seems to me a dangerous argument.

Secondly, as regards the secrecy, it has been pointed out that if this document created a charge on all land which the testator had at the date of its execution, it created an estate in equity which might take precedence of a purchaser. But that is perfectly true of a great many other instruments, including the common case of a marriage settlement, which is locked up in a family box, kept in a solicitor's office or muniment-room, and never seen until it is called for by the urgency of the case. It frequently happens that a man has the power of defrauding a purchaser or a mortgagee if he chooses to conceal a document. I think it would be going a great deal too far to say that this charge is not good on that ground. I therefore put aside, and I think I ought to put aside, the ground of public policy. It may be that it would be a great advantage that charges of this kind should not be allowed to take effect—that is to say,

(1) (1853) 4 H. L. C. 1. (2) (1824) 2 Bing. 229, 252.

that there should be, for instance, a register of all charges on all property, and that fraud should be thereby rendered, as far as can be, impossible, and that even something short of what most people call fraud should be prevented, namely, confusion in ownership; but hitherto that has not been the policy of English law, except to a very small extent. We have no authority for saying that a charge of this kind is not permissible. The nearest, and I think the only, approach to the proposition put forward by the plaintiffs is a single passage in Lord Macnaghten's judgment in *Tailby* v. *Official Receiver*. (1) After referring to *In re Count D'Epineuil* (2), where the memorandum of charge was not unlike the present one in substance, he says (3): "I much doubt whether a memorandum like that on which the claimant relied could create a specific lien of any sort or kind." Lord Macnaghten is suggesting a doubt which may hereafter have to be solved. If it is to be solved in the sense of saying that a general charge cannot create a specific lien of any sort or kind, I venture to think that must be done by the House of Lords. I doubt very much, with respect, whether it can be done by the Court of Appeal; I am perfectly sure it cannot be done by a court of first instance.

The charge must, therefore, be paid out of the policy moneys.

Solicitors: *Ford, Lloyd, Bartlett & Michelmore; Bower, Cotton & Bower, for H. B. Bradley, Folkestone; Hamlin, Grammer & Hamlin, for Bridgman, Weaver & Wild, Chester; Warren, Murton & Miller, for Hallett, Creery & Co., Ashford, Kent.*

(1) 13 App. Cas. 523. (2) 20 Ch. D. 758.
(3) 13 App. Cas. 544.

G. R. A.

KEKEWICH J.

1899

Aug. 9.

In re SHARLAND.
In re REW.
REW *v.* WIPPELL.

[1899 S. 1991.]

Power — Execution — Limited Power — Exercise by Will — General Words of Appointment — General Powers — No Reference to Limited Power — Intention.

A testatrix had two general powers of appointment in addition to a limited power to appoint the income of certain property to her husband for life. By her will, which contained no reference to the limited power or to the property subject thereto, she gave, devised, and bequeathed all her real and personal estate, and appointed all real and personal estate over which she might have a power of appointment unto her husband absolutely:—

Held, that the testatrix had clearly expressed her intention of exercising every power she had in favour of her husband, and that the limited power was therefore exercised.

ORIGINATING SUMMONS.

By his will dated December 11, 1878, Edward Sharland gave the clear residue of his estate (subject as therein mentioned) to his trustees in trust for his children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry under that age with the consent of their guardians, in the shares and proportions therein mentioned, and declared that the trustees should retain the share of every daughter who should attain a vested interest, and during her life pay the income to her for her separate use without power of anticipation, and from and after her death should stand possessed of her share in trust for her children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry under that age with the consent of their guardians; and if there should be no such children as aforesaid, then after the death of the daughter and such default of her children as aforesaid the trustees should stand possessed of her share in trust for such persons and for such purposes as she should by will or codicil appoint; and in default of such appointment, her original or accruing share or shares should accrue to the testator's other children as therein mentioned. And the testator declared that, notwithstanding

the trusts thereinbefore declared in favour of the issue of his daughters, it should be lawful for each of his daughters when married by will or codicil to appoint that all or any part of the income of her original and accruing share or shares should from and after her death be paid to her husband for his life or for any less period, and upon such conditions and with such restrictions as she should think fit.

The testator died on February 20, 1886, leaving two sons and three daughters, all of whom attained the age of twenty-one years.

One of these daughters—namely, Bessie Wippell Sharland,—married the plaintiff Henry Godfrey Rew on April 21, 1897, having by her marriage settlement, dated April 13, 1897, settled certain funds in trust for herself until the marriage, and from and after the marriage in trust for herself for life without power of anticipation, and after her decease upon such trusts as she should by deed or will appoint, and in default of such appointment upon trust for the children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry under that age, in equal shares.

On January 14, 1898, Bessie Wippell Rew made her will, which, omitting formal parts, was as follows: "I hereby revoke all former wills, and I give, devise, and bequeath all my real and personal estate, and I appoint all real and personal estate over which I may have a power of appointment unto my husband, the said Henry Godfrey Rew, absolutely, and hereby appoint him sole executor of this my will."

The testatrix died on April 22, 1898, leaving one child only, namely, the infant defendant, Kathleen Bessie Rew. A doubt being raised whether the testatrix had exercised her power of appointing a life interest to her husband in her share under her father's will, the husband took out this summons against the sole surviving trustee of that will, and the infant, to determine the point.

Renshaw, Q.C., and *Ward Coldridge*, for the husband. The testatrix evidently intended to exercise all her powers in favour

KEKEWICH J.
1899
SHARLAND, *In re.*
REW, *In re.*
REW *v.* WIPPELL.

of her husband, who was an object of the special power. The special power is, therefore, well exercised: *In re Teape's Trusts* (1); *In re Milner*. (2) In those cases there was only one power; but that fact merely went to intention. It was not the basis of the decisions. In *Thornton* v. *Thornton* (3) two special powers were held to be exercised by a gift of all property over which the testator had any disposing power.

P. O. Lawrence, Q.C., and *E. P. Hewitt*, for the infant. "The instrument must refer either to the power, or to the property subject to the power; or it must affect to deal with some property in general terms, not defining it, under such circumstances that it cannot have effect except upon the property comprised in the power": Farwell on Powers, 2nd ed. p. 176. "General words of appointment will be a sufficient reference to a limited power, if the donee have no other, and if the appointee be an object of the power": Ibid. p. 183. The present instrument does not satisfy those tests. The word "absolutely" is appropriate to the general powers, not to the special power. The word "may" is not appropriate to a special power in existence at the date of the will. In *In re Richardson's Trusts* (4) the use of the word "appoint" was held insufficient to exercise a special power, there being no evidence that the testatrix had no general power, and it being stated and not denied that she had.

Warrington, Q.C., and *Arthur Underhill*, for the trustee.

No reply was called for.

KEKEWICH J. The general rules for the construction of wills purporting or alleged to exercise general and special powers of appointment are well ascertained. The difficulty is to apply those rules to particular cases. It always resolves itself into a question of intention. The propositions in Farwell on Powers, though substantially right, require qualification. It is not necessary to have a reference to the power or to the property, if the intention to exercise the power is otherwise clear. In this case the testatrix has clearly expressed her

(1) (1873) L. R. 16 Eq. 442.
(2) [1899] 1 Ch. 563.
(3) (1875) L. R. 20 Eq. 599.
(4) (1886) 17 L. R. Ir. 436.

intention of exercising every power she had in favour of her husband. It is beyond dispute that, if there had been no other power, the power of appointing a life estate to her husband would have been exercised by an appointment to him "absolutely." But in this case the testatrix had other powers, and, if she had not shewn a distinct intention of exercising all her powers, much might have been urged against the husband's contention. But the testatrix, after giving him all her own property, says: "I appoint all real and personal estate over which I may have a power of appointment." This would include a life estate or anything else. The word "may" is merely conditional, pointing to all powers existing at the time of her death, when her will comes into operation. All such powers it is her declared intention to exercise. To that intention everything must give way unless the words of appointment cannot consistently be applied to the power in question. Here there is nothing approaching inconsistency except the use of the word "absolutely," and that is not inconsistent enough to diminish the effect of the general intention. The husband, therefore, takes a life estate under the appointment.

Solicitors for husband and infant: *Preston, Stow & Preston, for Friend, Beal & Tarbet, Exeter.*

Solicitor for trustee: *A. W. Mills, for Graham Whitlock, Fareham, Hants.*

G. R. A.

BYRNE J. 1899

March 23, 25; *April* 12; *July* 5.

In re THE TRUSTEES OF HOLLIS' HOSPITAL AND HAGUE'S CONTRACT.

Vendor and Purchaser—Reverter—Common Law Condition—Shifting Use—Rule against Perpetuities.

In October, 1898, a contract was entered into on behalf of the present trustees of Hollis' Hospital for the sale of certain freehold property belonging to the hospital.

The property contracted to be sold formed part of certain property which had been conveyed by H. to trustees upon trusts for the hospital by deeds of lease and release dated May 17 and 18, 1726. The release contained a proviso that if at any time thereafter the premises thereby conveyed or any part thereof, or the rents, issues, and profits of the same or of any part thereof, should be employed or converted to or for any other uses, intents, or purposes than those thereinbefore mentioned, then and from thenceforth all and every the premises thereinbefore conveyed should revert to the right heirs of H. party thereto.

The title had been accepted and the draft conveyance approved when a letter was received by the purchaser's solicitors from A., one of the trustees of the hospital, intimating that as the heir-at-law of H. he had not concurred in the sale, and calling their attention to the clause in the release under which if the sale was carried out the property would revert to him.

A summons was thereupon taken out by the purchaser for a declaration that a good title to the hereditaments contracted to be sold had not been made:—

Held, that the condition was in terms and form a true common law condition, and was void as being obnoxious to the rule against perpetuities.

The dictum of Jessel M.R. in *In re Macleay*, (1875) L. R. 20 Eq. 186, and of North J. in *Dunn* v. *Flood*, (1883) 25 Ch. D. 629, discussed and followed.

The remarks in Challis on the Law of Real Property, 2nd ed. pp. 174–177, upon the question whether the rule against perpetuities applies to common law conditions in defeasance of a freehold, discussed at length and dissented from.

Held, further, that in view of the notice received from A. claiming as heir-at-law of H., and who declined to be bound by the decision, the title was not one which could be forced upon an unwilling purchaser.

In re Thackwray and Young's Contract, (1888) 40 Ch. D. 34, followed.

By an agreement dated October 3, 1898, a contract was entered into by an agent acting on behalf of a majority of the trustees of Hollis' Hospital to sell to Ernest Hague certain

freehold property belonging to the hospital, situate at Castle Dyke, near Sheffield, containing 25A. 1R. 17P., for 5750*l.*

Matters had proceeded so far that the purchaser was satisfied to accept the title, and the draft conveyance had been approved by the trustees' solicitor, when a letter dated November 16, 1898, was received by the purchaser's solicitors written by William Henry Anthony, one of the trustees who had not concurred in the sale, to the effect that as the heir-at-law of Thomas and John Hollis he thought it his duty to intimate to them that he was no party to the sale of the property, and to call their attention to a clause in the title-deeds as to the property reverting to the heir-at-law in case of its being devoted to any other purpose than that intended by the settlor; and a summons was taken out under the Vendor and Purchaser Act by Ernest Hague for the purpose of determining whether or not a good title had been shewn.

William H. Anthony declined to appear with his co-trustees upon the summons or to take any part in the argument. His counsel appeared simply to state that he was no party to the contract, and declined to be bound in any way by the present proceedings.

The purchaser, on the other hand, warned him that in the event of the title being held good and of the contract being completed it would hereafter be insisted that he was bound by the decision in his presence of the question of title raised.

The history and title of the property appeared from the recitals and documents to be as follows:—

By indentures of lease and release dated August 26 and 27, 1703, Thomas Hollis (father of Thomas Hollis, Senr.) of his charitable mind and disposition to the intent to find and provide habitations for sixteen poor persons from time to time and for ever to be elected of the poor of Sheffield, or within two miles round as thereby directed, and to raise moneys necessary for keeping the fabric in which such other habitations were made at all times thereafter in repair, conveyed certain hereditaments in Sheffield then converted into sixteen small apartments or habitations with other hereditaments to certain persons therein named, their heirs and assigns for ever, to

BYRNE J. 1899 HOLLIS' HOSPITAL (TRUSTEES OF) AND HAGUE'S CONTRACT, *In re.*

their use and behoof upon trust and subject to the powers, declarations, and agreements therein mentioned and expressed.

By an indenture of assignment dated January 24, 1704, the same Thomas Hollis assigned to Thomas Hollis, Senr., his executors, administrators, and assigns, certain Government terminable annuities amounting to 90*l.* per annum; and by deed-poll dated January 26, 1704, Thomas Hollis, Senr., declared that the same annuities were so assigned to him upon trust that he should pay the same towards maintaining the said almshouses, and for several other purposes in the said deed mentioned.

By a writing or codicil under his hand and seal dated February 21, 1715, annexed to the deed of assignment of January 24, 1704, Thomas Hollis, the father, revoked several payments in that deed contained, and left his son, Thomas Hollis, Senr., liberty to continue or discontinue them as he, his executors or assigns, should think fit without being accountable to any.

Thomas Hollis (father of Thomas Hollis, Senr.) died, and the before-mentioned annuities were turned into South Sea annuities and South Sea Stock, which annuities and stock were sold by Thomas Hollis, Senr., for 1500*l.*

Thomas Hollis, Senr., for the augmentation of the said charities and for the better settlement thereof, added to the 1500*l.* the sum of 610*l.*, and with those two sums purchased certain messuages, lands, and tenements from Sir John Statham and Thomas Turner.

At the date of the next-mentioned indentures the hereditaments originally conveyed by the indentures of lease and release of August, 1703, had become legally vested in Thomas Hollis, Senr., and ten other persons (including Thomas Hollis the younger) by way of survivorship or otherwise.

By indenture of lease for a year dated May 17, 1726, and made between Thomas Hollis, Senr., of the one part and John Williams of the other part, Thomas Hollis, Senr., in consideration of 5*s.* bargained and sold the hereditaments so purchased by him from Sir John Statham and Thomas Turner (which included the property comprised in the contract the subject of

the present application) unto the said John Williams. To have and to hold unto the said John Williams, his executors, administrators, and assigns, from the day next before the day of the date of that indenture for a year at a peppercorn rent if demanded, to the intent and purpose that by virtue of that deed and of the statute for transferring of uses into possession, the said John Williams might be in the actual possession of all and singular the premises aforesaid, and be thereby enabled to accept a grant and release of the reversion and inheritance thereof to him, his heirs and assigns for ever, to and for such uses, trusts, intents, and purposes as in and by such release should be limited, expressed, and declared concerning the same.

There was a similar indenture of lease to John Williams, mutatis mutandis, by the then trustees of the almshouses and premises comprised in the release of 1703.

By an indenture dated May 18, 1726, and made between the said Thomas Hollis, Senr., of the first part, the ten named persons (including Thomas Hollis, younger) therein mentioned, (being the ten persons in whom, jointly with Thomas Hollis, Senr., the property originally devoted to charity by the father of Thomas Hollis, Senr., was then legally vested), of the second part, the said John Williams of the third part, and Isaac Hollis, William Steed, Daniel Bridges, and John Crooks of the fourth part, after reciting the deeds and matters before referred to, it was witnessed that for the support and maintenance of the said charity and for the better accomplishment and performance of the trusts and powers in them reposed by former conveyances, the said Thomas Hollis, Senr., and the ten persons parties of the second part, nominated, elected, and chose the four persons parties of the fourth part to be trustees, to be added to the surviving trustees in the room of such others of the said trustees as were dead; and it was further witnessed that in consideration of 5*s*. apiece to the old trustees, paid by the said John Williams, the old trustees granted, aliened, released, and confirmed unto the said John Williams in his actual possession of the tenements and hereditaments next thereinafter mentioned then being by force and virtue of

BYRNE J.
1899
HOLLIS' HOSPITAL (TRUSTEES OF) AND HAGUE'S CONTRACT, *In re.*

the indenture of bargain and sale for one year bearing date the day before the date of this indenture, in consideration of money and by force of the statute for transferring of uses into possession, and to his heirs the hereditaments by the indenture of release of August, 1703, conveyed by Thomas Hollis (father of Thomas Hollis, Senr.), to hold unto the said John Williams, his heirs and assigns for ever, to the use and behoof of Thomas Hollis, Senr., and the fourteen other persons, the old and new trustees, their heirs and assigns for ever, upon the trusts and to and for the several and respective uses, intents, and purposes thereinafter limited, expressed, and declared of and concerning the same; and it was thereby further witnessed that the said Thomas Hollis, Senr., for the better support and maintenance of the said charity and for the augmentation thereof and in consideration of 5*s.* paid by the said John Williams, granted, aliened, released, and confirmed to the said John Williams (in his actual possession of the hereditaments thereinafter mentioned then being by force and virtue of the indenture of bargain and sale for one year bearing date the day next before the date of this indenture, in consideration of money and by force of the statute for transferring of uses into possession), and to his heirs, all the hereditaments purchased by the said Thomas Hollis, Senr., from Sir John Statham and Thomas Turner. To have and to hold unto the said John Williams, his heirs and assigns for ever, to the use and behoof of the said Thomas Hollis, Senr., and the other old and new trustees, their heirs and assigns for ever. Nevertheless, upon the several and respective trusts and to and for the several and respective intents and purposes thereinafter limited, expressed, and declared of and concerning the same. Then follows a declaration of the trusts of all the hereditaments conveyed to the effect that the old and new trustees and the survivors and survivor of them, their heirs and assigns, or the heirs and assigns of such survivor, should place and put sixteen poor persons that should be of the ages of fifty years at least and single, of the town of Sheffield or within two miles round, in the sixteen apartments or dwellings (being the hereditaments originally conveyed by Thomas Hollis, the father of Thomas

Hollis, Senr.), with divers provisions for the government of the charity and filling up vacancies. And upon this further trust that they the said old and new trustees, their heirs and assigns, or the major part of them, their heirs and assigns, should pay, apply, employ, and lay out the rents, issues, and profits of all and singular the premises thereinbefore granted and released as therein mentioned for the benefit of the objects of the charity, including paying a schoolmaster and schoolmistress for the teaching of fifty poor artificers' and tradesmen's children, and that they the said trustees should lay out and expend such part or parts of the rents, issues, and profits that should or might arise or grow out of the thereby granted and released premises in the necessary support and reparations of the tenements and apartments, and what could be spared thereof (if any) to be kept in store against any extraordinary occasion for repairing, or to be laid out in such other manner as the trustees or the major part of them, their heirs and assigns, should think fit. Then follow provisions for the appointment of new trustees, for keeping accounts for laying out the balance, with power to deduct out of the rents, issues, and profits 5*l.* to defray charges of keeping and settling accounts, and to eat and drink in commemoration of the benefactors of the charity; and then follows this provision, upon which the question in the present case arises:—

"Provided always and it is hereby declared and agreed by and between the said parties to these presents, that if at any time hereafter the premises hereby conveyed or any part thereof, or the rents, issues, and profits of the same or of any part thereof, shall be employed or converted to or for any other use, or uses, intents, or purposes than as are hereinbefore mentioned and specified. Then and from thenceforth all and every the buildings, lands, and premises hereinbefore conveyed to the uses and upon the trusts hereinbefore mentioned shall revert to the right heirs of the said Thomas Hollis, Senr., party hereto, anything herein contained to the contrary thereof in anywise notwithstanding."

Then follow certain powers for Thomas Hollis, Senr., during his life, and after his decease for John Hollis, Newman Hollis,

BYRNE J. 1899 HOLLIS' HOSPITAL (TRUSTEES OF) AND HAGUE'S CONTRACT, *In re.*

Junr., Isaac Hollis, and Richard Solley, four of the trustees, and the survivors and survivor of them, at any time or times during their lives or the life of the survivors or survivor of them, to nominate the persons to receive the benefit of the almshouses and to appoint schoolmasters and schoolmistresses, and a power for Thomas Hollis, Senr., in his lifetime to revoke, add, alter, or diminish all or any of the charities or sums thereinbefore appointed in such manner as he should see fit, and a power for the trustees to pay their costs, charges, and expenses, and to lease for terms not exceeding twenty-one years, and to lease certain closes, purchased of Thomas Turner, for 800 years or any less term to build on, and a covenant with John Williams, his heirs and assigns, against incumbrances.

Farwell, Q.C., and *Bristowe*, for the purchaser. The question is whether the clause of reverter in the deed of May 18, 1726, is void as infringing the rule against perpetuities. We submit that it is not void. This is a common law condition in defeasance of an estate of freehold, and the rule against perpetuities does not apply to common law conditions. The rules relating to common law conditions had been settled centuries before the rule against perpetuities had been thought of, and there is no trace to be found in the old common law authorities of any disposition to apply what may be called a "time test" to common law conditions: Challis on the Law of Real Property, 2nd ed. pp. 174, 175. There is no direct authority to be found that a strictly common law condition is subject to the rule against perpetuities.

In *In re Macleay* (1) the remark of Jessel M.R. that since it (the condition) was confined to a life in being, it could not be open to any objection on the ground of remoteness, may be said to have been an expression of his opinion that if it had been unlimited as to time it would have been void for remoteness. But that remark was only an obiter dictum, and the opinion expressed by North J. in *Dunn* v. *Flood* (2), that a common law condition is subject to the rule against perpetuities, was obiter dictum. A freehold estate may be limited to trustees

(1) L. R. 20 Eq. 186. (2) 25 Ch. D. 629.

so long as the property continues to be used for a particular purpose: *Attorney-General* v. *Pyle*. (1)

[They also referred to the following authorities: *In re Ridley* (2); *In re Randell* (3); *In re Bowen* (4); *Aspden* v. *Seddon* (5), and to the following text-books: Kent's Commentaries on American Law, vol. iv. p. 126; Gray on the Rule against Perpetuities, p. 213; Lewis on the Law of Perpetuity, p. 615; Sanders on Uses and Trusts, 5th ed. vol. i. pp. 207–213; Coke upon Litt., p. 201a, c. 5, sec. 325; Fearne's Contingent Remainders, 10th ed. vol. i. p. 381, and submitted that, the condition not being within the rule against perpetuities, a good title had not been shewn.]

Levett, Q.C., and *Stewart-Smith*, for the vendors. The conveyance of 1726 was by lease and release, and is one under the Statute of Uses and not a conveyance at common law. By the lease Thomas Hollis, Senr., sold the hereditaments to John Williams, to the intent and purpose that by virtue of that deed and of the statute for the transferring of uses into possession, John Williams might be in possession of the premises and be thereby enabled to accept of a grant and release of the reversion and inheritance thereof to him, his heirs and assigns for ever, to and for such uses, trusts, intents, and purposes as in and by such release should be limited, expressed, and declared concerning the same; and then by the release Thomas Hollis, Senr., granted, aliened, released, and confirmed to John Williams (in his actual possession) and to his heirs all the said hereditaments, to hold the same to the said John Williams, his heirs and assigns for ever, to the use and behoof of Thomas Hollis, Senr., and the other old and new trustees, their heirs and assigns for ever. The trustees under those deeds took no estate by common law; they took the fee by virtue of the statute, and the common law condition could only take this out of them by shifting the use.

The remarks by Mr. Challis at p. 174 of his work only apply to a common law condition in defeasance of a common law conveyance.

(1) (1738) 1 Atk. 435.
(2) (1879) 11 Ch. D. 645.
(3) (1888) 38 Ch. D. 213.
(4) [1893] 2 Ch. 491.
(5) (1876) 1 Ex. D. 496.

BYRNE J.
1899
HOLLIS' HOSPITAL (TRUSTEES OF) AND HAGUE'S CONTRACT, *In re.*

The condition here, whether it operates by way of a shifting use or by way of condition subsequent, is void as tending to a perpetuity. Mr. Lewis in his work, at p. 615, admits that in common law conveyances the period for the coming into operation of a condition was unlimited, and the true view seems to be to except purely common law conveyances from the rule against perpetuities.

We submit that the condition is void, and that the vendors can make a good title.

Clare, for W. H. Anthony, took no part in the argument, at the same time declining to agree to be bound by the decision.

Farwell, Q.C., in reply.

Cur. adv. vult.

July 5. BYRNE J., after stating the facts as set out above, proceeded :—It is contended on behalf of the purchaser that a good title cannot be made by reason of the clause in the deed of May 18, 1726, providing for the reverter to the right heirs of Thomas Hollis, Senr., inasmuch as the sale will be a breach of the condition and, alternatively, that the title shewn is not one which ought to be forced upon a purchaser.

It is contended on behalf of the vendors—that is, the trustees other than W. H. Anthony—that the condition is void as tending to a perpetuity, and that whether the clause in question be construed as operating by way of shifting use, as they say it should be, or by way of condition subsequent.

The effect of the method of conveyance adopted was as follows : the lease for a year operated, and the bargainee John Williams was in possession by the Statute of Uses. The release operated by enlarging the estate or possession of the bargainee to a fee—this was at the common law—and the use being declared in favour of persons other than the bargainee the statute intervened and annexed or transferred the possession of the releasee to the use of the trustees to whom the use was declared : see Butler's notes to Coke upon Littleton, 18th ed. p. 272a, note vi. 2.

I think the clause about which the contest arises is in terms and form a true common law condition subsequent,

being aptly worded and being in favour of the heirs of Thomas Hollis, Senr.

It is true that words of an express condition may in certain cases be intended as a limitation, but the rule is that it shall not ordinarily be so construed, and there does not appear to be any reason in the present case why it should be construed as a limitation rather than as a condition: see Sheppard's Touchstone, 7th ed. p. 124, note 16.

It was conceded in argument that if the clause in question ought to be construed as a limitation or as creating a shifting use it would be void as infringing the rule against perpetuities; and it was argued that the clause ought to be construed as one intended to shift the use which was vested by virtue of the release in the trustees, upon the happening of the contemplated event, in the heirs of the original bargainor, and that it was not possible for it to operate otherwise, having regard to the fact that the estate to be defeated was one existing only by virtue of the statute. I do not think that this argument can prevail.

It is laid down in terms in Sheppard's Touchstone, p. 120, that a condition may be annexed to a limitation of uses and thereby the same—namely, the uses or the estates arising from the uses—may be made void. To which statement a note is appended by Mr. Preston: "and shall be executed by Statute 27 Hen. 8, so that the donor and his heirs may take advantage of the condition. Sav. 77. See further in Vin. Abr. Condition (N.)."

In *Serjeant Rudhall's Case* (1) the serjeant, "being cestui que use in fee, and therefore being entitled to devise the use, devised certain lands before the Statute of Uses by his will in writing to Charles his younger son and the heirs male of his body, with remainder to John his eldest son in fee, with this condition: that neither the said Charles nor any of his heirs of his body should aliene or discontinue any of the said lands but only to the jointure of his wife for the time being, and for the use of the said jointures of the said wives of the said heirs for term of lives of the said wives. And after the said William

(1) Savile, Case clv., p. 76.

BYRNE J. 1899 HOLLIS' HOSPITAL (TRUSTEES OF) AND HAGUE'S CONTRACT, *In re.*

Rudhall died and Charles his son entered, and after the year 4 Edw. 6 (that is, after the Statute of Uses), by his indenture leased the land to the defendants for term of their lives, rendering the ancient rent to him, his heirs and assigns. Then, 1 Eliz., the said Charles levied a fine to certain persons and their heirs with proclamations, which was to the use of the said Charles and Alice his wife and the heirs male of the body of Alice by him begotten, and for default of such issue to the use of the heirs of the said Charles begotten, and for default of such issue to the use of the right heirs of the said William Rudhall the father. And it was averred that the use of this fine was for the jointure of the said Alice for term of her life. And the plaintiff, as heir of Serjeant Rudhall, entered for the condition broken. And in this case three doubts arising: one, if *it was condition or limitation of estate in use;* another, if the condition was broken; and the third, if the heir of the cestui que use should take advantage of condition broken by the Statute of Uses. And it appears that this is condition, because condition destroys the estate and returns the land to the donor and his heirs; a limitation of estate is when the first estate is destroyed and new estate limited by way of remainder or otherwise. And here is condition, because there is not a new estate limited over, but the estate to which it is annexed is destroyed. And then arises for consideration if the condition is broken: and it appears that lease for lives of the defendants reserving the ancient rent being made according to the statute is not a discontinuance. For the statute has given power to make such estates that they are legal, and legal estates cannot make injurious discontinuances. Therefore the condition in this respect is not broken; but the limitation of other uses by which other heirs are inheritable than were at first is to break the condition. For the limitation of use on fine in special tail is contrary to the will of Serjeant Rudhall. And the limitation of the fee to the heirs of Serjeant Rudhall is other limitation to heirs than as he himself limits: for he limits the fee to John Rudhall, his eldest son, and his heirs; and it might be that John Rudhall and his heirs are heirs of the half-blood to the direct heirs of Serjeant Rudhall, whence it is other inheritance

than as was in the first limitation, which is breach of the condition. And as to the taking advantage of condition annexed to the use, it appears that the Statute of Uses has given this advantage when the uses and possession are united, that the heir of the father enter, by which it appears, by the opinion of all the justices, that the entry was allowable and the plaintiff shall recover. And it was adjudged that his entry was allowable, for the condition was broken by limitation of use in special tail and of the other remainder in fee in the heirs of the father; but lease for life, according to the statute, is not discontinuance, and, therefore, no breach of condition. Also, this entry for condition is warranted by the Statute of Uses, and, also, it was agreed that this was condition and not limitation."

I have translated the report out of the Law French, and I think that the case, which is also reported in other books (1), is an authority for the statement in Sheppard's Touchstone, p. 120.

The next question is, whether or not the condition, being an express common law condition subsequent, is void for perpetuity. I have not been referred to any case deciding the question, nor have I since the argument, after a considerable search, been able to find any authority in the reports enabling me to say that the point has been judicially decided.

For the exposition of our very complicated real property law, it is proper in the absence of judicial authority to resort to text-books which have been recognised by the Courts as representing the views and practice of conveyancers of repute. Except in the comparatively recent although most valuable book of the late Mr. Challis (whose loss we all regret), to which I shall have to refer more fully later on, I cannot find any definite statement of opinion adverse to the views expressed by Mr. Sanders and Mr. Lewis in their well-known treatises, and I will first refer to Sanders on Uses and Trusts, 5th ed. vol. i. pp. 206, 207, 213. [His Lordship read the passages, and continued:—]

I find in Lewis on Perpetuity, ed. 1843, pp. 615, 616, the

(1) Moore, 212; 1 Leon. 298.

BYRNE J.
1899
HOLLIS' HOSPITAL (TRUSTEES OF) AND HAGUE'S CONTRACT, *In re.*

opinion of the learned author expressed in clear and unambiguous language. [His Lordship read the passages, and continued:—]

Amongst quite modern text-writers I find a similar expression of opinion. See the work of the learned American author Mr. Gray, who has written on the Law of Perpetuity, at p. 215, where he states his view, in spite of the fact that there are American authorities tending the other way, the point not having been taken or argued in such authorities: see also Marsden on Perpetuities, p. 4.

I have purposely avoided referring to certain dicta in recent cases until I come to examine Mr. Challis' argument, which was in fact the basis of the argument put forward on the part of the purchaser in the present case. That argument and the learned author's expression of opinion are to be found in Challis' Law of Real Property, 2nd ed. pp. 174–177. [His Lordship read the passages he referred to, and continued:—]

Pausing at the introductory paragraphs, I do not propose to embark upon a consideration of the origin and development of the rule or rules against perpetuities, about which there have been and will continue to be grave differences of opinion amongst real property lawyers. I find a clear and well-recognised rule certainly applicable to all ordinary methods of disposition in vogue since the Statute of Uses, and what I have to do is to see whether or not that rule applies to prevent the effectuating by means of a common law condition what is forbidden by the law in the case of all other methods of disposition of property.

Mr. Challis is right of course when he says that "when any part of the common law is found to require amendment, the Legislature alone is competent to apply the remedy." But the Courts have first to find what is the common law—that is, the principle embodied in what is called the common law—and to apply it to new and ever-varying states of fact and circumstances. The common law is to be sought in the expositions and declarations of it in the decisions of the Courts and in the writings of lawyers. New statutes and the course of social development give rise to new aspects and conditions which have to be regarded in applying the old principles. The policy

of the law against the creation of perpetuities was certainly asserted at a very early date, as was also the policy of discountenancing unrestricted restraints upon alienation. I may give by way of illustration what was said by Lord Macnaghten in the case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1) [His Lordship read the passage, and continued :—]

Might it not be said from Mr. Challis' point of view that if it was the common law in the reign of Queen Elizabeth that all restraints of trade, general or partial, were void, that they must still be void? The answer appears to me to be that the principle was that restraints of trade are contrary to public policy, and that is the principle still; it is the application of it that has varied.

An illustration of a void condition because impossible of fulfilment is given in Sheppard's Touchstone, p. 133—namely, if one give or grant land on condition that a man will go to Rome in three days. That which was impossible at the time when the illustration was given has now become possible owing to a change of circumstances, and though the old principle stands the application of it has changed. In reference to the suggestion as to devising "a novel restriction to be applied to novel forms of limiting, or otherwise conferring, an estate or interest unknown to the common law" (Challis, p. 175), I may point out that in the present case the object of the grantor could not have been obtained without adopting a novel form of assurance unless in a very roundabout and circuitous fashion. He wanted to vest the estate in himself jointly with others.

It is right to mention here that this case being one of a gift for charitable purposes, the question could not have arisen had the deed been dated ten years later than it was, having regard to the provisions of the Mortmain Act (9 Geo. 2, c. 36), which provides that the gift or conveyance must be without any power of revocation, reservation, trust, condition, limitation clause or agreement whatsoever for the benefit of the donor or grantor, or of any person or persons claiming under him.

I think that some of Mr. Challis' criticisms of the dicta of

(1) [1894] A. C. 535, 564, 565.

BYRNE J.
1899
HOLLIS' HOSPITAL (TRUSTEES OF) AND HAGUE'S CONTRACT, *In re.*

Jessel M.R. in the case of *In re Macleay* (1) are not quite reasonable. The use of the expression "tenant in tail" at p. 190 of the report is an obvious slip, either verbal or clerical, for "tenant in fee," as is clear by reference to p. 187, where the learned judge says: "Looking at the will, I have no doubt that there is a condition annexed to the gift in fee," and this is followed in the next sentence by the remark: "First of all, it is to be observed that the condition, good or bad, is confined within legal limits; it is applicable merely to the devisee himself, and therefore is not void on any ground of remoteness."

This being so, I find in the passage I have read, coupled with the passage at p. 190, referred to by Mr. Challis, a clear expression of opinion by Jessel M.R. that had the condition in question not been limited in point of time, as it was, it would have been void for remoteness.

The decision of North J. in *Dunn* v. *Flood* (2) as to the remoteness of the power of re-entry in that case was obiter, in the sense that it was unnecessary for the purposes of the decision to determine it, although it was a question raised and argued; but I think that Mr. Challis, in saying that nothing was said on appeal (3) to support the obiter dictum, appears to have overlooked the observation of Baggallay L.J. (4), where he says: "This right of re-entry was held by Mr. Justice North to be void for remoteness. We have not heard the counsel for the defendant, but, as at present advised I concur with Mr. Justice North that this right could not be enforced being void under the rule against perpetuities."

I must also notice that Mr. Challis makes no reference whatever to the opinions of Sanders and Lewis which I have quoted.

The result appears to be that there are expressions of opinion by Jessel M.R., North J., and Baggallay L.J., and the opinions of two great real property lawyers and text-writers, in favour of the invalidity of such a condition as the one in question; besides the opinions of modern text-writers; while on the other side there is nothing definite except the opinion and reasoning of the late Mr. Challis in his work on real property. It is to be noticed that Mr. Challis put forward the surmise that at the

(1) L. R. 20 Eq. 186.
(2) 25 Ch. D. 629.
(3) (1885) 28 Ch. D. 586.
(4) 28 Ch. D. 592.

present day the Courts would not acquiesce in the conclusion he draws without great reluctance; and in reference to his appeal to arguments to be derived from history, I may refer to his own observations: Challis, p. 394. [His Lordship read them, and continued:—]

I am of opinion that the condition in question is obnoxious to the rule against perpetuities.

But this still leaves another question for consideration, namely, is the title one which ought to be forced upon a purchaser? The rule which should be followed in such cases is thus stated by Chitty J. in the case of *In re Thackwray and Young's Contract.* (1) [His Lordship read the observations, and proceeded:—]

I have not in the present case any decisions or dicta of judges to lead me to a contrary conclusion to that to which I have come, and the question is one of general law, upon which I have dicta of eminent judges and opinions of text-writers of authority which I consider justify the view I have expressed.

At the same time, the point is one of some obscurity and difficulty, and one which cannot be said to have been the subject of direct judicial decision. Moreover, regard must be had to the fact that the person claiming to be heir-at-law of Thomas Hollis, Senr., has given a notice which must be taken to be notice of his intention to claim the benefit of the breach of condition, if broken, and he has declined to argue, or to be bound by the present decision; so that the purchaser if he completes will be in danger of immediate litigation—an element which must have very great weight in considering whether or not the title ought to be forced upon him: see *Pegler* v. *White* (2) and Fry on Specific Performance, 3rd ed. p. 408.

Upon a consideration of all the circumstances I do not think I ought to say that such a title has been shewn as ought to be forced upon the purchaser if he is unwilling to complete.

Solicitors: *Johnson, Weatherall & Sturt, for Burdekin & Co., Sheffield; R. Sutton Clarke; Torr & Co., for Anthony & Imlach, Liverpool.*

(1) 40 Ch. D. 34, 38, 39, 40. (2) (1864) 33 Beav. 403.

G. M.

BYRNE J.

1899

June 2, 7; *July* 29.

MUTTON *v.* PEAT.

[1896 M. 2026.]

Banking Account—Appropriation of Payments—Application of Rule in Clayton's Case.

T. & Co., stockbrokers, had two accounts with their bankers—an ordinary current account and a loan account: on the latter account 7500*l.* was owing on December 30, 1895, against which were deposited securities belonging in fact to certain of their clients. On January 11, 1896, T. & Co. paid to the credit of their current account a sum of 790*l.* 4*s.* 6*d.*, which they had received from P. for investment. On January 13 T. & Co. were declared defaulters on the Stock Exchange, and on January 24 they were adjudicated bankrupt. On January 20 the bankers closed T. & Co.'s current account, and transferred the balance, 1362*l.* 10*s.*, which included the 790*l.* 4*s.* 6*d.* received from P., and which had not been invested, to a new account in their books which may be called the "liquidation account," and proceeded to realize the securities deposited with them as above mentioned, by the sale of which the whole of the 7500*l.* owing to them on the loan account was satisfied by January 30, as appeared from the entries in the "liquidation account," leaving a small balance in their hands.

P. claimed to be repaid the sum of 790*l.* 4*s.* 6*d.* out of the 1362*l.* 10*s.*, the balance on the current account transferred to the liquidation account:—

Held, that, the bankers having appropriated specific receipts to payment of a specific balance due from the customer, the rule in *Clayton's Case*, (1816) 1 Mer. 572, 585, did not apply, and that there did not exist any equity entitling the cestuis que trust of the deposited securities as against P. to require the application of the rule, and that P. was therefore entitled to be paid out of the 1362*l.* 10*s.*

The rule in *Clayton's Case* applies where there is one unbroken account, and it applies as between cestuis que trust in an appropriate case: *In re Hallett's Estate*, (1880) 13 Ch. D. 696; *In re Stenning*, [1895] 2 Ch. 433.

Messrs. Tatham & Co., stockbrokers, had two accounts with Messrs. Glyn, Mills, Currie & Co., their bankers—one an ordinary account current; the other a loan account.

On January 11, 1896, Messrs. Tatham paid to the credit of their current account a sum of 790*l.* 4*s.* 6*d.*, which they had received from a customer named Parker for investment. On January 13, 1896, Messrs. Tatham were declared defaulters on the Stock Exchange. On January 21 a receiving order was

made against them, and on January 24 they were adjudicated bankrupt.

On January 20, 1896, the bankers closed Messrs. Tatham's current account, and transferred the balance then standing to the credit of that account, namely, 1362*l.* 10*s.*, to a new account opened in the name of Messrs. Tatham in a book of the bankers devoted to bankruptcies and liquidations. This balance of 1362*l.* 10*s.* included and was made up in part by the 790*l.* 4*s.* 6*d.* paid by Parker for investment, but which was never in fact invested.

It appeared from the loan account of Messrs. Tatham in the loan book of the bankers that on December 30, 1895, a sum of 7500*l.* was owing on that account becoming due in course of ordinary dealing on January 16, 1896.

The bankers held, and had held since November 30, 1895, certain securities deposited by Messrs. Tatham, and which belonged to certain of their clients, for securing this indebtedness; and prior to January 20, 1896, the bankers proceeded to realize those securities. On January 20, 1896, the bankers credited Messrs. Tatham's new account, hereinafter called the "liquidation account," with sums amounting to 3342*l.* 15*s.*, being proceeds of sale of some of the securities; and on January 22, 1896, they debited the same account as follows: "Loan (part) discharged, 3340*l.*; twenty days' interest to January 20, 3*l.* 13*s.* 2*d.*"

On January 24, 1896, the same account was credited with 574*l.* 10*s.* in respect of a further sale of securities, and was debited as follows: "Loan (part) discharged, 570*l.*; twenty days' interest, 15*s.*"

Further sums were received by the bankers on January 25, 27, 30, 1896, in respect of sale of the above securities, all of which sums were duly credited to Messrs. Tatham & Co. in the liquidation account, and on the other side of the same account there appeared the entry under the date January 30: "Loan (balance) discharged, 3590*l.*; thirty days' interest, 5*l.* 17*s.* 11*d.*"

It appeared from this account that, so far as entries in their books shewed, no part of the balance of 1362*l.* 10*s.* transferred from the current account was applied in reduction of the loan

BYRNE J.
1899
MUTTON
v.
PEAT.

account, and that the proceeds of the sale of securities were specifically appropriated in discharge of the loan account, leaving a small balance in the hands of the bankers.

On March 20, 1896, the bankers wrote to Messrs. Foyer & Hordern, the solicitors acting for some other person interested in the cash balance, a letter, in which they stated that the balance in their hands at the time of the suspension of Messrs. Tatham & Co. was not needed for the repayment of advances which were met by the sale of securities, and that they retained the amount of that balance pending possible judicial decision.

The secretary to the bankers made an affidavit in which he exhibited a copy of the liquidation account, and stated that he had in it shewn the proceeds received by them in respect of the securities, the dates of receipt of the proceeds, and how such proceeds as well as certain dividends received in respect of some of the said securities were applied by the bankers.

This was a summons taken out by Parker, claiming to be repaid the sum of 790*l.* 4*s.* 6*d.* so paid by him to Messrs. Tatham & Co. for investment out of the 1362*l.* 10*s.*, the balance on the current account transferred to the liquidation account.

George Lawrence, for the summons. The rule in *Clayton's Case* (1) does not apply; that rule applies only to current accounts or accounts between debtor and creditor themselves, and not as between third parties claiming the balance: *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"* (2); but it does apply as between cestuis que trust where there is a conflict through insufficiency: *In re Hallett's Estate* (3); *In re Stenning*. (4)

In this case the bankers appropriated, as they were entitled to do, specific receipts to the payment of a specific balance due from the customer, and property specifically charged is primarily liable in exoneration of property subject only to a general lien.

The owners of the deposited securities have no equity as against the owner of the balance transferred from the current

(1) 1 Mer. 572, 585, 603.
(2) [1897] A. C. 286.
(3) 13 Ch. D. 696.
(4) [1895] 2 Ch. 433.

account. [He also referred to *In re Sherry* (1) and *In re Dunlop*. (2)]

Kenyon Parker, for defendants in the same interest.

Levett, *Q.C.*, and *Hull*, for the plaintiff, the owner of some of the securities sold. As between the banker and the customer all the accounts make but one account, and as between rival claimants it is immaterial what entries the bankers made in their books, or what they did by way of appropriation. The rule in *Clayton's Case* (3) is applicable, not only as between the bankers and their customers, but as between third parties claiming the fund, and applies to this case. The owners of the securities are entitled to participate in the fund transferred from the current account.

[They also referred to *Pedder* v. *Preston Corporation* (4); *In re European Bank* (5); *Thomson* v. *Clydesdale Bank* (6); Grant's Law of Banking, 5th ed. p. 250.

Younger, for a defendant in the same interest, referred to *Hancock* v. *Smith*. (7)

Daniel Jones, for the defendant Peat.

S. Dickinson, for the bank.

George Lawrence, in reply.

Cur. adv. vult.

July 29. BYRNE J., after stating the facts, proceeded:— It is conceded that the bankers might, had they been so minded, have applied the balance transferred from current account in part discharge of the amount due to them on loan account, but they did not do so.

They were entitled to appropriate the proceeds of the sale of securities as they did, namely, in discharge of the indebtedness on loan account, to secure which the securities had been deposited. It is to be noted, moreover, that interest is charged in the liquidation account on the amount due in respect of loan account, a part of which would not have been chargeable had

(1) (1884) 25 Ch. D. 692.
(2) (1882) 21 Ch. D. 583.
(3) 1 Mer. 572, 585, 608.
(4) (1862) 12 C. B. (N.S.) 535.
(5) (1872) L. R. 8 Ch. 41.
(6) [1893] A. C. 282.
(7) (1889) 41 Ch. D. 456.

BYRNE J.
1899
MUTTON
v.
PEAT.

the balance of current account been applied in part discharge of loan account.

But it is argued on behalf of owners of securities, which have been realized and which were wrongfully deposited by Messrs. Tatham, being securities belonging to customers of theirs, that it does not matter as between rival claimants to the funds what entries the bankers made in their books or what they in fact did, by way of appropriation; that as between banker and customer all the accounts make but one account (which is true for certain purposes), and that the rule in *Clayton's Case* (1) ought to be treated as applicable, not only as between the bankers and other persons, but as between third parties claiming the balance. The rule in *Clayton's Case* (1) applies where there is one unbroken account, and it applies as between cestuis que trust in an appropriate case: see *In re Hallett's Estate* (2); *In re Stenning*. (3) In *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"* (4) Lord Macnaghten cites (5) what was said by Jessel M.R. in *In re Hallett's Estate*. (6) "It is a very convenient rule, and I have nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then of course that which is a mere presumption of law gives way to these other considerations." And, after citing a passage to a similar effect from the judgment of Baggallay L.J. in the same case (7), he proceeds to deal with the case before the House of Lords upon the footing of the qualification referred to.

Suppose the bankers had not made any appropriation of the moneys received by them from the sale of securities, but had simply made one account by means of transfer to the credit of the liquidation account of the balance on current account, and had added the amount received by them from sale of securities, entering items on the debit side without distinguishing, it may well be that the rule in *Clayton's Case* (1) would have applied;

(1) 1 Mer. 572, 585, 608.
(2) 13 Ch. D. 696.
(3) [1895] 2 Ch. 433.
(4) [1897] A. C. 286.
(5) Ibid. 295.
(6) 13 Ch. D. 728.
(7) [1897] A. C. 296.

but I have in what was actually done by the bankers clear evidence that they appropriated, as they were clearly entitled to do, specific receipts to payment of a specific balance due from the customer. I think that this excludes the application of the rule in *Clayton's Case* (1), and I cannot find authority for saying that there exists any equity entitling the cestuis que trust of the deposited securities as against the cestui que trust of the transferred balance from current account to require the application of the rule in *Clayton's Case* (1), or to maintain a right to say that the moneys ought to be deemed to have been dealt with otherwise than they in fact were. I think that Mr. Parker has established his claim. This decision applies also to the other claimants to the cash balance if they succeed in tracing their moneys into the fund.

Solicitors: *Longbourne, Stevens & Co.; Foyer & Hordern; Bower, Cotton & Bower, for H. B. Bradley, Folkestone; Duffield & Bruty; Blunt & Co; Murray, Hutchins, Stirling & Murray.*

G. M.

In re DIXON.
HEYNES *v.* DIXON.

[1898 D. 245.]

Husband and Wife—Separate Property—Loan to Husband—Bond by Husband —Interest on Bond—Damages—Civil Procedure Act, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 5.

Under a marriage settlement dated in 1847, certain real estate was vested in trustees upon trust for the wife for life, with remainder to the husband for life, with remainders over. The settlement contained a power of sale and for reinvestment with the consent of the husband or wife on real or personal security.

The estate having been sold, the trustees in 1852, on the written request of the wife, advanced the proceeds of sale to the husband on the security of his bond, conditioned for repayment of the sum advanced six months after date with interest at 4*l.* per cent.

The husband and wife lived together in amity for more than twenty years after the date of the bond, the wife dying in 1876 and the husband in 1896. The husband never during his wife's lifetime or afterwards paid

(1) 1 Mer. 572, 585, 608.

BYRNE J.

1899

DIXON, *In re.* HEYNES *v.* DIXON.

any interest on the bond, or gave any written acknowledgment to the trustees of the settlement :—

Held, that, the hand to pay and to receive the interest being the same, no payment over was necessary, and, therefore, that the Statute of Limitations did not run, and the bond was still subsisting.

In re Hawes, (1892) 41 W. R. 173; *Stone* v. *Stone*, (1869) L. R. 5 Ch. 74; *Spickernell* v. *Hotham*, (1854) Kay, 669, 673, discussed.

Interest is payable as interest and not as damages under a bond having a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, even although no express mention of interest is made in the bond. The amount of interest recoverable is not diminished by reason only of the bond being conditioned for payment of principal and interest up to or at a certain date.

Bonafous v. *Rybot*, (1763) 3 Burr. 1370; *Farquhar* v. *Morris*, (1797) 7 T. R. 124; *Amos* v. *Smith*, (1862) 1 H. & C. 238, discussed.

By a settlement dated October 1, 1847, made on the marriage, which was afterwards solemnized, of Thomas Dixon with Jane Heynes, the one-fifth part or share of certain real estate to which the said Jane Heynes was entitled under the will of her grandfather was conveyed to trustees upon trust for sale and for investment of the proceeds on real or personal security, and for the variation of investments, and it was provided that no investment or change of investment should be made during the lives of the said Jane Heynes and Thomas Dixon, or the survivor of them, without her or his consent in writing first obtained, and upon further trust to pay the income of the trust funds as the said Jane Heynes should, notwithstanding coverture, by any writing signed by her, direct or appoint, and, in default of appointment, should pay the same to the said Jane Heynes for her sole and separate use, and after her decease upon trust to pay or permit and suffer the said Thomas Dixon or his assigns to receive the same for his life, and, after the decease of the survivor, upon trust for such person or persons as the said Jane Heynes should by deed or will appoint, and, in default of appointment, upon trust for the children of the marriage as therein mentioned; and it was declared that in case there should be no child of the marriage (which event happened) the trust funds should, after the respective deaths of the said Jane Heynes and Thomas Dixon, be assigned, paid, and transferred to such person or persons as

would have been entitled thereto as next of kin of the said Jane Heynes at the time of her death had she died sole and intestate to the exclusion of the said Thomas Dixon either as the administrator or by right of marriage.

By an indenture dated September 16, 1851, the real estate, to one-fifth share whereof the said Jane Heynes (then Jane Dixon) was entitled, was conveyed to trustees upon trust for sale, and in pursuance thereof the entirety of the estate was sold, and the one-fifth share of the said Jane Dixon in the proceeds thereof was ultimately ascertained to be the sum of 1928*l.* 5*s.* 10*d.*

By a memorandum in writing dated February 12, 1852, and signed by the said Jane Dixon, she authorized the trustees of the settlement of October 1, 1847, to lend the said sum of 1928*l.* 5*s.* 10*d.* to her husband, the said Thomas Dixon, upon his giving to them his bond or obligation in writing, conditioned for payment of the said sum of 1928*l.* 5*s.* 10*d.* with interest thereon at the rate of 4*l.* per cent. per annum at the expiration of six calendar months from the date thereof.

The trustees accordingly lent the said Thomas Dixon the said sum of 1928*l.* 5*s.* 10*d.*, and by his bond, dated February 13, 1852, he bound himself, his heirs, executors, and administrators, in the penal sum of 3856*l.* 11*s.* 8*d.*, the consideration of the bond being that if he, his heirs, executors, or administrators, should pay to the trustees of the settlement the full sum of 1928*l.* 5*s.* 10*d.*, with interest for the same at and after the rate of 4*l.* per cent. per annum upon August 13 then next ensuing, without any deduction or abatement whatsoever, then the obligation should be void and of no effect, or else should remain in full force and virtue.

The said Thomas Dixon never repaid to the trustees of the settlement the said sum of 1928*l.* 5*s.* 10*d.*, nor any part thereof.

Under the trusts of the settlement the said Jane Dixon was entitled to the interest of the money secured by the bond down to the time of her death, which occurred on May 21, 1876, and the said Thomas Dixon was entitled to such interest from his wife's death down to the time of his own death, which occurred on January 1, 1896.

BYRNE J.
1899
DIXON, *In re.* HEYNES *v.* DIXON.

The said Jane Dixon never exercised the power of appointment given to her by the said settlement, and died intestate. The said Thomas Dixon by his will, dated April 13, 1886, appointed the defendants his executors. During the whole of the joint lives of the said Jane Dixon and Thomas Dixon they lived together in amity.

This action was commenced for the administration of the real and personal estate of the said Thomas Dixon, and the plaintiffs, as the present trustees of the settlement of October 1, 1847, claimed that there was due and owing to them as such trustees from the estate of the said Thomas Dixon, under and by virtue of the said bond, the sum of 1928*l.* 5*s.* 10*d.*, with interest at 4*l.* per cent. per annum from January 1, 1896.

It appeared that the bond had for many years been in the possession of the said Thomas Dixon, and that it was not till after the plaintiffs had made their claim in respect of it that it had been discovered among the papers of the testator, together with the memorandum of February 12, 1852. No interest was ever paid by the said Thomas Dixon in respect of the bond.

Farwell, Q.C., and *Christopher James*, for the plaintiffs. The question is whether there has been any part payment or part satisfaction on account of the interest due on the bond within the meaning of the 3 & 4 Will. 4, c. 42, s. 5. It has always been held that, while a husband and wife are living together in amity as these were, the receipt by the husband of the separate income of the wife may be treated as a gift of that separate income to him to be applied for the joint benefit of himself and his wife, as for the maintenance of their household and the like: *In re Flamank*. (1) In this case the husband ought to have paid the trustees the interest on the bond as it became due, and the trustees ought to have handed it to the wife. If that had been done it would clearly have taken the case out of the statute. The wife allowed the trustees to forbear demanding interest from her husband in order to avoid the idle ceremony of obtaining payment from him to the trustees and then payment by them to her, and she then

(1) (1889) 40 Ch. D. 461, 469.

handing it back to her husband. In fact, the hand to receive and the hand to pay were the same. That being so, the statute does not run: *In re Hawes* (1); *Caton* v. *Rideout* (2); *Mills* v. *Borthwick* (3); *Amos* v. *Smith.* (4)

Levett, Q.C., and *W. Baker*, for the defendants. This claim is statute-barred. A bond debt does not carry interest as interest. Where a written security is given for the payment of money at a certain day with interest up to that day, and the sum secured and the interest thereon are not paid at the day, the principal and interest become from that time a debt which, when recovered by legal process, may, in the discretion of a jury or of the Court, be made the subject of an additional liability, which, however, is not properly a liability to interest according to the contract, but to damages for the breach of it: *Cook* v. *Fowler* (5); *In re Roberts.* (6) There is neither an express nor implied contract in the bond to pay interest, and anything in the nature of interest can only be given as damages: *Webster* v. *British Empire Mutual Life Assurance Co.* (7)

On the question of the non-payment of interest by the husband to the trustees, assuming the bond carried interest, they referred to *Stone* v. *Stone* (8) and *Spickernell* v. *Hotham.* (9)

Farwell, Q.C., in reply. Interest on a bond is payable from the time of payment, namely, from the date, though not expressly reserved: *Farquhar* v. *Morris.* (10)

Aug. 8. BYRNE J. The case of *Bonafous* v. *Rybot* (11) was heard on argument of a rule obtained under the Act 4 & 5 Anne, c. 16, s. 13, whereby it was enacted, "That if at any time pending an action upon any such bond with a penalty ('such bond' meaning any bond with a condition or defeasance to make it void on payment of a lesser sum at a day or place certain), the defendant shall bring into the court

(1) 41 W. R. 173.
(2) (1849) 1 Mac. & G. 599.
(3) (1865) 13 W. R. 707.
(4) 1 H. & C. 238.
(5) (1874) L. R. 7 H. L. 27.
(6) (1880) 14 Ch. D. 49.
(7) (1880) 15 Ch. D. 169.
(8) L. R. 5 Ch. 74.
(9) Kay, 669, 673.
(10) 7 T. R. 124.
(11) 3 Burr. 1370.

BYRNE J.
1899
DIXON, *In re.* HEYNES *v.* DIXON.

where the action shall be depending, all the principal money, and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the Court shall and may give judgment to discharge every such defendant of and from the same accordingly"; and in giving judgment Lord Mansfield said (1): "It is surprising, that after the statute of usury, 37 Hen. 8, which excepts obligations with condition, made upon a just and true intent, the courts of law did not consider the just intent of a bond to be principal, interest and costs, secured by a penalty; and suffer the party, at any time, to save the forfeiture by performing the intent. It is more extraordinary, that after this was settled in a court of equity 'to be the nature of a bond,' and therefore every party to a bond understood it in this sense; the courts of law did not follow equity, but still continued to do injustice, as of course; and put the parties to the delay and expense of setting it right elsewhere, as of course." I ought to add that Lord Bramwell in *Preston* v. *Dania* (2) expresses disagreement with the observations of Lord Mansfield as to the injustice of the course formerly adopted by the courts of law; but I do not understand him to dissent from Lord Mansfield's statement of the practice of courts of equity, nor does he dissent from the construction put upon the statute of Anne as applied to common money bonds; but this case did decide that the statute of Anne does not apply to bonds for moneys payable by instalments.

Reading these cases with the cases of *Farquhar* v. *Morris* (3) and *Amos* v. *Smith* (4), I think that interest is payable as interest and not as damages under a bond having a condition or defeasance to make void the same upon payment of a lesser sum at a "day or place certain," even although no express mention of interest is made in the bond; and I cannot see any just reason for holding that the amount of interest recoverable is diminished by reason only of the bond being conditioned for

(1) 3 Burr. 1373.
(2) (1872) L. R. 8 Ex. 19, 22.
(3) 7 T. R. 124.
(4) 1 H. & C. 238.

payment of principal and interest up to or at a certain date. The bond may be so framed as to shew an intent to limit interest recoverable as up to a specified date; but in my judgment it wants more than the circumstance I have referred to to shew such an intent.

In the present case, the trustees lawfully lent a sum of money on the personal security of his bond to the husband. That loan on bond was an investment within their power, and the trustees could have recovered interest from the husband so long as the bond was unredeemed. If they had claimed and received interest, it would have been their duty to hand it over to the wife, who might or might not have handed it to the husband for their common use. For more than twenty years no interest was claimed from the husband; the wife (being a party to the direction to the trustees to lend the money) never called upon the trustees to enforce payment. She and her husband lived in amity until her death, and I think the right inference to draw under the circumstances is that she allowed her trustees to forbear demanding interest from her husband to avoid the absurdity of obtaining payment by the husband to the trustees, payment by the trustees to herself, and then handing it back to her husband.

It appears to me that the principle of *Caton* v. *Rideout* (1) applies. In *Edward* v. *Cheyne* (2) Lord Watson says (3): [His Lordship read the passages he referred to, and proceeded:—]

I do not think that Kindersley V.-C. in *Mills* v. *Borthwick* (4) meant to lay down any rule adverse to what I have stated as my view in reference to a bond conditioned like the present, although he did call attention to the fact that the condition was not that the husband should pay in six months certainly, but only if he should be called upon to do so.

Cook v. *Fowler* (5) was not the case of a bond, but the case of a warrant of attorney and defeasance, and not such a debt as before 3 & 4 Will. 4, c. 42, would have been held to carry

(1) 1 Mac. & G. 599.
(2) (1888) 13 App. Cas. 385.
(3) 13 App. Cas. 390, 391.
(4) 13 W. R. 707.
(5) L. R. 7 H. L. 27.

BYRNE J.
1899
DIXON, *In re.* HEYNES *v.* DIXON.

interest, so that interest could only have been given by way of damages. The case, therefore, does not appear to be applicable to the present one.

I think that *In re Hawes* (1), although distinguishable from the present case on the ground that it had relation to an advance to the husband upon mortgage, is nevertheless in point when once the conclusion is arrived at that the loan upon bond was an authorized security within the terms of the trust, and was one, moreover, which the trustees could not change without the consent of husband and wife.

In *Spickernell* v. *Hotham* (2) the covenant was to transfer certain new 4*l.* per cent. annuities to trustees to hold upon certain trusts, and Wood V.-C. held that, as the trust fund never had any existence, he could not assume that a person had been paying himself the interest of a non-existing fund—that is, the trust security never came into existence.

In *Stone* v. *Stone* (3) no trust fund or security had ever come into existence, and it was held that the covenant was simply a legal obligation barred by lapse of time. These cases seem to me to be distinguishable, therefore, from the present one.

I do not think that the fact of the bond being found in the possession of the husband is sufficient evidence from which I ought to infer payment; I think that the explanation suggested in the affidavits, namely, that it came into his possession by mistake, is probably the true one.

The result is that I feel entitled to hold, and do hold, that the hand to pay and the hand to receive were, during the life-time of the wife as well as afterwards, the same, and that consequently the bond debt is not barred.

Solicitors: *Thomas White & Sons; Fallows & Rider.*

(1) 41 W. R. 173. (2) Kay, 673.
(3) L. R. 5 Ch. 74.

G. M.

VIDITZ *v.* O'HAGAN.

COZENS-HARDY J.

1899

June 9, 16.

[1896 V. 615.]

Marriage Settlement—Wife an Irishwoman under Age—Husband a domiciled Austrian—Covenant to settle Wife's after-acquired Personalty—Ratification — Repudiation — Rectification — Austrian Law — Application of English Law.

In 1864 an Irish lady, aged eighteen, married an Austrian at Bern. By the marriage articles, which were in English form and were executed at the British Embassy at Bern, the husband covenanted that all the after-acquired personal property of the wife (except pecuniary legacies) should be settled upon usual trusts for the wife for life, with a restraint on anticipation, and the children of the marriage. In 1867 the wife attained her majority. In 1870 she became entitled, on the death of her mother, to a sum of 6000*l.*, which was paid to the trustees of the marriage articles. In 1880 the wife and her husband, whilst in Paris, executed a deed in English form by which the 6000*l.* was settled upon the trusts of the marriage articles. This deed contained a covenant to settle all the after-acquired personal property of the wife, including pecuniary legacies. In 1884 she became entitled, on compromising an action, to a sum of 5000*l.*; and in January, 1893, she became entitled to a legacy of 2000*l.* Soon after she was informed for the first time that the 5000*l.* and the legacy must be paid to the trustees of her marriage settlement. In November, 1893, she and her husband, under legal advice, executed in Austria a notarial act, whereby they purported to annul the settlement created by the marriage articles and deed of 1880, and to vest in her an absolute control over all her property, which by Austrian law it was competent for them to do. In 1896 the lady and her husband brought an action against the trustees of her marriage settlement, and claimed a declaration that the settlement created by the marriage articles and the deed of 1880 had been annulled and were void by Austrian law; alternatively, they asked for rectification of the deed of 1880 so far as it went beyond the marriage articles, and contended that, in any event, the lady was entitled to repudiate the settlement so far as the 5000*l.* and legacy were concerned:—

Held, following *Van Grutten* v. *Digby*, (1862) 31 Beav. 561, that the marriage articles were valid and were governed by English law:

Held, also, following *Edwards* v. *Carter*, [1893] A. C. 360, that the lady, not having repudiated the marriage articles within a reasonable time after she attained twenty-one, was absolutely bound thereby, and that it was not competent for her to elect from time to time during coverture as property fell in whether or not she would affirm it, and consequently that the 5000*l.* was bound by the settlement.

Smith v. *Lucas*, (1881) 18 Ch. D. 531, not followed; and *Cooper* v. *Cooper*, (1888) 13 App. Cas. 88, distinguished.

COZENS-HARDY J.

1899

VIDITZ v. O'HAGAN.

Held, also, that if ratification were necessary, there had been ample ratification:

Held, further, that the deed of 1880 must be rectified so as expressly to exclude pecuniary legacies, and therefore that the legacy of 2000*l.* was not bound by the settlement.

IN November, 1864, the Honourable Frances Netterville, then aged eighteen, and the only child of Viscount Netterville, an Irish peer, was married, at Bern in Switzerland, to Mr. Viditz, an Austrian. By marriage articles under seal in English form dated November 24, 1864, and executed before the marriage at the British Embassy at Bern, and made between Mr. Viditz of the first part, Mrs. Viditz (then the Honourable Frances Netterville) of the second part, certain trustees of the third part, and Viscount Netterville of the fourth part, it was declared and agreed and Mr. Viditz thereby covenanted with the trustees that, in case the intended marriage should take place, all such personal property as Mrs. Viditz was then entitled to in possession, reversion, remainder or expectancy, and also all such sums of money, stocks, funds or other personal property, whether in possession, remainder or expectancy, as might at any time during the joint lives of the husband and wife come to the wife, or to her and her husband in her right, under any will, settlement, or by gift or otherwise (save and except pecuniary legacies), should be assured to and vested in the trustees upon the usual trusts for the benefit of the wife for her life for her separate use with a restraint upon anticipation, and after her death upon certain trusts for the issue of the marriage, with an ultimate trust for Viscount Netterville absolutely. This deed contained a very unusual clause empowering Viscount Netterville to alter and vary any of the provisions, clauses, matters or things therein contained, and to add or supply any other provisions, clauses, matters or things which might be deemed necessary or proper.

At the date of her marriage Mrs. Viditz was entitled under the marriage settlement of her parents, contingently on her attaining twenty-one, to a sum of 6000*l.* on the death of her mother and a sum of 2000*l.* on the death of her father.

Mrs. Viditz attained her majority on November 5, 1867. In

1870 Mrs. Viditz, on the death of her mother, became entitled in possession to the 6000*l.*, which sum was paid to the trustees of the deed of 1864 and invested in Consols.

On July 12, 1880, a deed in English form, which purported to be a settlement in pursuance of the deed of 1864, was executed in Paris. Mr. and Mrs. Viditz, and her father, and the trustees, were all parties. It recited the investment of the Consols, and declared trusts of that sum similar, so far as material for the purposes of this case, to the trusts in the deed of 1864, and it contained a covenant to settle after-acquired property of Mrs. Viditz different from the covenant in the deed of 1864, inasmuch as pecuniary legacies were not excepted.

In 1880 and again in 1881 Mrs. Viditz was a party to the appointment of new trustees of her settlement created by the deeds of 1864 and 1880.

In 1882 Viscount Netterville died, and Mrs. Viditz thereupon became entitled in possession to the 2000*l.*, which was paid to the trustees of her settlement and invested.

Viscount Netterville by his will left all his property to charity. Litigation ensued, and Mrs. Viditz sought to set aside the will. The result was that a compromise was effected n March, 1884, under which a sum of 13,000*l.* was to be settled upon her and her children, and a sum of 5000*l.* was to be paid to her. No part of this sum had as yet been received by her. In May, 1884, Mrs. Viditz mortgaged the 5000*l.* coming to her under the compromise. In 1889 Mrs. Viditz, under a power reserved to her in her marriage settlement, appointed one-fourth of the trust funds to her daughter Constance on her marriage.

In January, 1892, Mrs. Viditz became entitled to a legacy of 2000*l.* under the will of her aunt; and in November of the same year she was for the first time informed that the 5000*l.* and the legacy of 2000*l.* would have to be paid to the trustees of her marriage settlement. She took advice, and in November, 1893, she and her husband executed in Austria, and in accordance with Austrian law, a notarial act by which they purported to revoke and annul the deeds of 1864 and 1880, and

COZENS-HARDY J.

1899

VIDITZ v. O'HAGAN.

to vest in Mrs. Viditz the unrestricted administration of all her property.

In 1896 Mr. and Mrs. Viditz and their four children (all of whom had attained twenty-one) commenced this action against the present trustees of the deeds of 1864 and 1880, claiming a declaration that by virtue of the notarial act of November, 1893, the marriage articles of 1864 and settlement of 1880 were wholly cancelled and annulled, and were void by Austrian law; alternatively, that the settlement of 1880 was void, or that Mrs. Viditz was entitled to repudiate it so far as the 5000*l.* and legacy of 2000*l.* were concerned. This was the trial of the action.

Expert evidence was given as to the law of Austria, from which it appeared that by that law the marriage articles of 1864 and settlement of 1880 would be governed by that law and were void, not having been executed as notarial acts; that children do not acquire vested interests under the marriage contracts of their parents, but only an expectancy; that a husband and wife have a right to revoke their marriage contract notwithstanding the birth of issue and acts of ratification; and that this right of revocation cannot be waived, and is not lost by lapse of time. It also appeared that by the law of France the deed of 1880 was void because it was not executed as a notarial act.

Eve, Q.C., and *Micklem*, for the plaintiffs. The deed of 1864 having been executed at the British Embassy is probably valid by English law: *Van Grutten* v. *Digby*. (1) But here the parties contemplated an Austrian domicil, and Mrs. Viditz on her marriage acquired and became subject to the law of her husband's domicil. Her capacity to affirm or disaffirm her contracts must, therefore, be governed by the law of that domicil: *Sottomayer* v. *De Barros* (2); *Harvey* v. *Farnie* (3); *Udney* v. *Udney* (4); *Cooper* v. *Cooper* (5); *Seaton* v. *Seaton*. (6) Having regard to the law of Austria, that law governs the deeds

(1) 31 Beav. 561.
(2) (1879) 5 P. D. 94.
(3) (1882) 8 App. Cas. 43.
(4) (1869) L. R. 1 H. L., Sc. 441.
(5) 13 App. Cas. 88.
(6) (1888) 13 App Cas. 61.

of 1864 and 1880, and those deeds have been effectually got rid of by the notarial act of 1893. But if this contention is wrong, then we say that the deed of 1864 was voidable by Mrs. Viditz after she attained twenty-one, and that the deed of 1880 was only a ratification pro tanto. It was competent for her, as property came in from time to time, to elect for or against the settlement: *Cooper* v. *Cooper* (1); *Smith* v. *Lucas* (2); *Burnaby* v. *Equitable Reversionary Interest Society*. (3) We do not claim the funds that have been paid over to the trustees, but we contend that there have been no acts of ratification by Mrs. Viditz since 1880. On the contrary, she has mortgaged the 5000*l*., and is entitled to repudiate the settlement so far as the 5000*l*. and the legacy are concerned. But if she is bound by the deed of 1880, then we ask for rectification of that deed so far as it goes beyond the deed of 1864. That is to say, that the covenant to settle after-acquired property should be rectified so as to exclude pecuniary legacies.

Hughes, *Q.C.*, and *Ingpen*, for the trustees. The deeds of 1864 and 1880 are valid and governed by the law of England: *Van Grutten* v. *Digby*. (4) They must be treated as English deeds for all purposes, and are unintelligible if judged by any other law. No doubt the deed of 1864 was voidable, and it was competent for Mrs. Viditz after she came of age to elect to repudiate it: *Barrow* v. *Barrow* (5); *Wilder* v. *Pigott* (6); but such election must be made within a reasonable time. She did not repudiate it within a reasonable time after she came of age, and it became absolutely binding on her: *Edwards* v. *Carter* (7); *In re Hodson*. (8) Her execution of the deed of 1880 and the appointment of new trustees were acts of ratification by her, if ratification were necessary. It is difficult to reconcile *Smith* v. *Lucas* (2) with *Edwards* v. *Carter* (7); but *Cooper* v. *Cooper* (1) is distinguishable. It was competent for the father, under the power reserved to him by the deed of 1864, to enlarge the scope of the covenant to settle after-acquired property in the deed of 1880.

(1) 13 App. Cas. 88.
(2) 18 Ch. D. 531.
(3) (1885) 28 Ch. D. 416.
(4) 31 Beav. 561.
(5) (1858) 4 K. & J. 409.
(6) (1882) 22 Ch. D. 263.
(7) [1893] A. C. 360.
(8) [1894] 2 Ch. 421.

COZENS-HARDY J.

1899

VIDITZ v. O'HAGAN.

Lynch, for the mortgagees of the 5000*l.*, adopted the plaintiffs' arguments.

Eve, Q.C., in reply. We rely on *Smith* v. *Lucas* (1) and *Coooper* v. *Cooper*. (2)

Cur. adv. vult.

June 16. COZENS-HARDY J. [His Lordship, after stating the terms of the marriage articles of 1864, and holding that the provision therein contained empowering the father of Mrs. Viditz to alter and vary any of the provisions, clauses, matters or things therein contained, and to add or supply any other provisions, clauses, matters or things which might be deemed necessary or proper, could not enable the father to enlarge or extend the scope of the settlement so as to bring in fresh property, proceeded as follows:—] This settlement is obviously in English form, and I think it must be treated by me as a good settlement and be governed by English law, without reference to the formalities or the substantial provisions which would have been required either by the law of Austria or by the law of the canton of Bern: *Van Grutten* v. *Digby*. (3) In that case Sir John Romilly, dealing with facts very similar to the present, said (4): "I hold it to be the law of this country that if a foreigner and Englishwoman make an express contract previous to marriage, and if on the faith of that contract the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, then and in that case this Court will administer the law on the subject, as if the whole matter were to be regulated by English law." Again (5), he says: "The settlement of the 9th of August is not a valid French contract of marriage, but it may be valid and binding on the parties to it, as a contract entered into for value relating to and affecting property in England, if the effect of the provisions of that contract be that the subject-matter of it is to be regulated by English laws"; and again (6): "But assuming that the settle-

(1) 18 Ch. D. 531.
(2) 13 App. Cas. 88.
(3) 31 Beav. 561.
(4) 31 Beav. 567.
(5) Ibid. 569.
(6) Ibid. 571.

ment is not and never could have been valid in France, I am of opinion that the provisions of the settlement itself and the evidence I have referred to establish, that the contract was, that this property should not be subject to French law, but that it should be subject to English law and governed accordingly." [His Lordship then further summarised the facts, and continued:—] The plaintiffs now ask in this action for a declaration that the settlement created by the deeds of 1864 and 1880 has been got rid of by the transaction of 1893; or, alternatively, they ask for rectification of the settlement so far as it goes beyond the articles, and in particular they assert that the settlement, if binding at all, is only binding to the extent of the funds actually in the hands of the trustees, and that it is competent to the lady to repudiate the settlement so far as the 5000*l.* and the legacy of 2000*l.* are concerned. The first question which arises for my decision is this: What was the effect of the deed of 1864 executed by Mrs. Viditz while a spinster and a minor? So far as I am concerned, this is settled by authority which is binding upon me. In *Edwards* v. *Carter* (1) it was decided by the House of Lords that a covenant in a marriage settlement by a male infant is voidable and not void, that it is not necessary to shew ratification or confirmation by the infant after attaining majority, and that unless he repudiates within a reasonable time he is absolutely bound. In *In re Hodson* (2) Chitty J. applied this doctrine to the case of a covenant by a female infant. In the present case it is clear that, if actual intention to ratify or confirm was necessary—although I hold it to be unnecessary—such intention is abundantly proved. In my judgment it is wholly unnecessary to consider whether, according to the law of Austria, Mrs. Viditz could have made a new disposition of her property at the time when she ratified and confirmed. The question is, was there repudiation within a reasonable time, and not, has there been ratification or confirmation? To the extent, therefore, of the sums of money received by the trustees in 1870 and 1882, I think the settlement of 1864 is binding, and the attempted revocation in 1893 is inoperative. It remains to

(1) [1893] A. C. 360. (2) [1894] 2 Ch. 421.

COZENS-HARDY J.

1899

VIDITZ v. O'HAGAN.

consider whether the 5000*l.* payable under the compromise and the legacy under the aunt's will of 1892 are, or whether either of them is, bound by the settlement. As to the 5000*l.*, it is urged that Sir George Jessel, in *Smith* v. *Lucas* (1), held that the right to repudiate exists during the coverture, and may be exercised from time to time in respect of any property which may fall in. But this seems to me to be inconsistent with the decision of the House of Lords in *Edwards* v. *Carter* (2)—see especially the observations of Lord Herschell. (3) It is not a covenant by an infant married woman, which would be void—*Seaton* v. *Seaton* (4)—but a covenant by an infant spinster, which is no longer voidable. I must treat the case just as if the lady had attained twenty-one when she executed the articles. I am not sure that it is necessary to add that, according to Austrian law, Mrs. Viditz has absolute power to dispose of all her property, notwithstanding coverture. I prefer to treat the 5000*l.* as bound in equity by the covenant in the deed of 1864. Reliance was placed by counsel for the plaintiff on the case of *Cooper* v. *Cooper* (5), and especially upon a passage in the judgment of Lord Watson. (6) In that case an Irish lady, while an infant, was married in Dublin to a Scotsman. A deed was executed by her in 1846 by which the husband covenanted to pay her 80*l.* a year, in the event of her surviving him, during life, and by which she accepted that provision in full satisfaction of all terce of lands, half or third of movables, and every other thing that she jure relictæ or otherwise could ask, claim, or demand from the husband in case she should survive him. On the husband's death the widow sought to reduce the contract of 1846, and it was held by the House of Lords that she was entitled to this relief. It is to be observed that this was not a contract disposing of her property, and probably was not a contract for her benefit, and that it may well have been held that it was time enough for her to repudiate when her husband had died, for, had she predeceased him, there would have been nothing to repudiate. Lord Watson says: (6) "I

(1) 18 Ch. D. 531.
(2) [1893] A. C. 360.
(3) Ibid. 365.
(4) 13 App. Cas. 61.
(5) 13 App. Cas. 88.
(6) Ibid. 106.

agree with your Lordships that the discharge which she seeks to set aside cannot stand in the way of her claiming her legal rights as a Scotch widow. The rule seems to be clear that an infant cannot, during minority, effectually subject herself to any contractual obligation which cannot be shewn to have been for her benefit. She may ratify the contract, after attaining majority, and so become liable to implement it, but in the circumstances of the present case, any such ratification of the contract would, according to the law of Scotland, have been revocable by her as a donation inter virum et uxorem." These observations may have had reference to a transaction between the husband and wife in 1863, but in any event they were not necessary for the decision of the case. As Lord Macnaghten observed (1): "Primâ facie, Mrs. Cooper was not bound by the settlement in question. Primâ facie, it was voidable by her. And she has elected to avoid it. It is not alleged that she has done any act to confirm it if not binding upon her at the time of its execution." I do not think there is any inconsistency between *Cooper* v. *Cooper* (2) and *Edwards* v. *Carter*. (3) I may add that Lord Watson was a party to the decision in *Edwards* v. *Carter*. (3)

As to the legacy, different considerations apply. It is expressly excepted from the covenant to settle after-acquired property in the articles of 1864. It is only covered by the wider covenant in the settlement of 1880. At that date Mrs. Viditz was a married woman. The deed of 1880 was invalid according to Austrian law and according to French law. And according to the law of England at that date, it was also inoperative as to future separate estate. The deed of 1880 goes beyond the articles of 1864 in a material respect. Rectification was asked at the bar, though this relief is not distinctly included in the claim. I do not understand that, assuming the articles of 1864 to bind Mrs. Viditz, any objection is raised to the terms of the deed of 1880 except in respect of the covenant. I, therefore, propose to rectify the settlement of 1880 by expressly excluding all pecuniary legacies. I think the best

(1) 13 App. Cas. 108. (2) 13 App. Cas. 88.
(3) [1893] A. C. 360.

COZENS-HARDY J.
1899
VIDITZ v. O'HAGAN.

course will be to dismiss the action so far as it seeks a declaration that the marriage articles and the deed of 1880 are void, but to direct rectification of the deed of 1880 so as to exclude all pecuniary legacies. I think I shall be justified in directing the trustees to pay the costs of the plaintiffs as between solicitor and client, and to retain their own costs, and costs, charges, and expenses properly incurred out of the trust estate standing in their names.

Solicitors for plaintiffs: *Kearsey, Hawes & Co.*
Solicitors for defendants: *Blount, Lynch & Petre.*

H. L. F.

COZENS-HARDY J.
1899
June 22, 23, 26, 27; *July* 6.

BARRON *v.* WILLIS.

[1898 B. 721.]

Husband and Wife—Solicitor and Client—Benefit to Relative of Solicitor—Rectification of Settlement.

The relation of husband and wife is not one of those relations to which the doctrine of *Huguenin* v. *Baseley*, (1807) 14 Ves. 273, applies; and there is therefore no presumption that a voluntary deed executed by a wife in favour of her husband and prepared by the husband's solicitor is invalid, but the onus probandi lies on the person who impugns the instrument and not on the person who supports it.

Nedby v. *Nedby*, (1852) 5 De G. & Sm. 377, followed.

Where the benefit taken by the husband was in effect the release of a general power of appointment by the wife under an existing post-nuptial settlement of property which had not belonged to the wife:—

Held, that the fact that this release in the result accelerated the benefit taken under the settlement by a son of the solicitor did not invalidate the release.

IN his judgment at the trial of this action, Cozens-Hardy J. said that it was necessary to state the admitted facts, and also the conclusions at which he had arrived as to the facts which were in dispute, and then he stated the undisputed facts as follows:—

In October, 1889, the plaintiff was married to Mr. Joseph Willis. He was the only son of his father, Thomas Willis,

who died in April, 1890, having appointed his widow, Ann Willis, his executrix and sole residuary legatee.

On December 29, 1890, a deed was executed which was made between Ann Willis of the first part, Joseph Willis of the second part, the plaintiff (then his wife) of the third part, and the defendants Nicholas Willis, Isaac Dunn, and William Moore Skinner of the fourth part. It recited that the property of Thomas Willis consisted of the particulars mentioned in the first, second, and third schedules, and that the property mentioned in the fourth schedule belonged to Joseph Willis. It further recited that Ann Willis believed that it was her late husband's intention to revoke or partially revoke his will and to dispose of his property in favour of his widow and son, and, with a view of carrying out in some measure the wishes of the testator, and also with the object of making provision for Joseph Willis and his wife and any future wife and the lawful issue of Joseph Willis, it had been agreed between Ann Willis and Joseph Willis by way of family arrangement that the properties mentioned in the schedules should be settled in manner thereinafter expressed. The trusts were during the joint lives of Ann Willis and Joseph Willis to pay him 100*l.* a year, subject thereto to pay the income to Ann Willis during her life, and subject thereto there was a protected life interest given to Joseph Willis, and after his death the trust was for the widow of Joseph Willis during her life, with subsequent trusts in favour of the children or issue of Joseph Willis, and in default of issue a general power of appointment by deed was given to Joseph Willis and the plaintiff jointly, and subject thereto a general power of appointment by deed was given to the survivor, and subject thereto the property was settled in trust as to one half for Nicholas Willis and as to the other half for Frederick Herbert Skinner, son of the defendant William Moore Skinner, absolutely. Nicholas Willis was a cousin of Joseph Willis, and Frederick Herbert Skinner was a great friend of Joseph Willis, and was then under twenty-one years of age.

In the year 1891 differences arose between Joseph Willis and his wife, mainly, if not entirely, by reason of the intemperate

COZENS-HARDY J.

1899

BARRON v. WILLIS.

habits into which he had fallen. On October 3, 1891, a deed was executed by Joseph Willis, the plaintiff (his wife), and Ann Willis, which recited that the deed of 1890 did not in all respects carry out the wishes of the parties to the family arrangement, and that it had been agreed that for the purpose of varying the trusts of the same deed and of fully carrying out the intention of the parties these presents should be executed, the said Ann Willis concurring therein to shew her assent to the same; and the deed provided, first, that the provision for the widow of the said Joseph Willis during her life should be read and construed as a provision only for the benefit of such widow so long only as she should remain the widow of the said Joseph Willis, and that the words "after the decease of the survivor" should be read and construed as "after the decease of the survivor or the marriage of the widow"; and by the same deed Joseph Willis and the plaintiff, in exercise of the joint power of appointment vested in them in case of failure of issue, appointed that the trust funds should be held in trust for such person and in such manner as Joseph Willis alone should by deed appoint, and in default of appointment, and so far as no such appointment should extend, then (excluding the power of appointment by a widow of the said Joseph Willis) upon the trusts declared by the principal deed of 1890.

Joseph Willis died intestate and without issue in September, 1893. By a deed dated August 2, 1894, between the plaintiff of the first part, Ann Willis of the second part, Frederick Herbert Skinner of the third part, and Nicholas Willis, Isaac Dunn, and William Moore Skinner of the fourth part, after reciting accurately the effect of the deeds of 1890 and 1891, and reciting that it had been agreed by way of family arrangement that such further modification of the trusts as was thereinafter contained should be executed, it was witnessed and it was thereby agreed and declared, and particularly the said Ann Willis, Nicholas Willis, and Frederick Herbert Skinner thereby agreed, declared, and directed that the direction contained in the settlement for payment or application of the income of the trust funds to or for the benefit of the widow of the said Joseph

Willis during her life should have full force and effect, and that such income should be paid to the plaintiff during her life in the same manner as if clause 1 of the modification deed of 1891 had not been inserted therein, and that in all other respects the deeds of 1890 and 1891 should be and were thereby confirmed.

All the three deeds of 1890, 1891, and 1894 were prepared by Mr. W. M. Skinner as solicitor, with the assistance of counsel. Mrs. Ann Willis died in April, 1897. In November, 1897, the plaintiff married again (her husband being William Barron), and on February 22, 1898, this action was commenced. Mr. W. M. Skinner purchased the reversionary interest of his son in one moiety, but, as Mr. Skinner had full notice of all circumstances which were said to render the deed of 1891 invalid, he could not be in any better position than his son.

Further on in his judgment, Cozens-Hardy J. said the conclusions at which he had arrived upon the disputed facts were as follows: "In the first place, I think that Joseph Willis and his mother, Ann Willis, were both desirous that the property which came from them should not go to 'a strange man,' by which, of course, was meant a second husband of the plaintiff, or to any member of her family, and this desire was made known to the plaintiff. She did not deem this desire unreasonable or improper, and she consented to give effect to it. Joseph Willis and his mother thought that the deed of 1890 did not, in respect to those matters, give effect to their real intentions, though such intentions had not been communicated to Mr. Skinner. He was angry at the suggestion that there was any mistake on his part, and unwilling that the deed should be modified. In the second place, I think the deed of 1891 was in substance a transaction between the plaintiff and her husband. In the third place, I think the nature and effect of the deed of 1891 were explained to the plaintiff on September 30, 1891, and again on October 3, when it was executed by her and her husband, and that on that occasion Mr. Skinner suggested that both of them should go to some other solicitor. In the fourth place, I think the deed of 1894 was most carefully explained to the plaintiff prior to its execution, and I believe that she understood its effect, although she has now brought

COZENS-HARDY J.

1899

BARRON v. WILLIS.

herself to believe that it was never explained to her and that she never understood it. In the fifth place, I think that Mr. Skinner did act as the plaintiff's solicitor in the matter of the 1894 deed, which is not complained of, but that he did not act for her in the matter of the 1891 deed. Whether at that time the relation of solicitor and client existed between the plaintiff and Mr. Skinner is a matter of more doubt, which I propose hereafter to deal with. In the sixth place, I think that no case has been made for setting aside or rectifying the deed of 1891, unless it can be impeached on the ground of some fiduciary relation."

Towards the conclusion of his judgment, Cozens-Hardy J. (as reported below) said he was not satisfied that, until long after the execution of the deed of 1891, W. M. Skinner ever was or acted as the plaintiff's solicitor, and he referred to certain facts and evidence in support of this view.

The action was commenced on February 22, 1898, the defendants being Nicholas Willis, Isaac Dunn, W. M. Skinner, and F. H. Skinner; and the plaintiff claimed—(1.) a declaration that the deed of 1891 was not binding on her so far as it purported to deprive her of the general power of appointment given to her by the deed of 1890; (2.) a declaration that the deed of 1894 was not binding on her so far as it confirmed the deed of 1891; (3.) rectification of the same deeds so far as necessary; (4.) a declaration that W. M. Skinner was not entitled to make any gain for his son, F. H. Skinner, at the expense of the plaintiff; (5.) damages against W. M. Skinner; (6.) costs.

The action was tried, with witnesses, before Cozens-Hardy J. on June 22, 23, 26, and 27, 1899.

Hughes, Q.C., and *Ashton Cross*, for the plaintiff. W. M. Skinner was or acted as the plaintiff's solicitor with reference to the deed of 1891, and he was also a trustee of the deed of 1890, and there was clearly a fiduciary relation between them. He neglected to perform the duties imposed on him by that relation. He did not explain the deed of 1891 to her or point out that she was surrendering a general power of appointment without obtaining any equivalent; he did not allow her to see

any draft of the deed; and, although his son, F. H. Skinner, was taking an interest under the deed, he never took care that she had the benefit of independent advice. Under these circumstances, the deed of 1891 cannot be supported. There was not placed round the plaintiff, as against those who advised her, the care and providence which the law requires in such a situation as she was in: *Huguenin* v. *Baseley*. (1) The relation of solicitor and client is regarded with particular jealousy, and when a gift is taken independent advice is essential to the validity of the gift: *Goddard* v. *Carlisle* (2); *Morgan* v. *Minett*. (3) Age or capacity are only important where no confidential relation exists: *Rhodes* v. *Bate*. (4) Where the transaction would be set aside so far as it conferred benefits on a solicitor, his son will not be allowed to retain a benefit under it: *Bridgman* v. *Green* (5); *Bainbrigge* v. *Browne* (6); *Liles* v. *Terry*. (7)

Eve, *Q.C.*, and *Austen-Cartmell*, for the defendants W. M. Skinner and F. H. Skinner. The deed of 1891 is valid. The evidence fails to shew that W. M. Skinner was the solicitor of the plaintiff with reference to that deed, or that there was any fiduciary relation between them. The deed was explained to the plaintiff, and she perfectly understood her position. She was contracting with her husband, and cannot complain that in the result F. H. Skinner derived a benefit.

Astbury, *Q.C.*, and *P. F. S. Stokes*, for the defendant Willis. The evidence shews that there was no undue influence; but the deed of 1891 was only a transaction between the plaintiff and her husband whereby she gave up something for his benefit. There is nothing in such a gift which throws the onus on the husband or those claiming under him, for the relation of husband and wife is not within the doctrine of *Huguenin* v. *Baseley* (1); the onus is on those who impeach the transaction, and the mere fact that the husband's solicitor prepares the deed is not sufficient to invalidate the transaction: *Nedby* v. *Nedby*. (8)

(1) 14 Ves. 273; 1 W. & T. 7th ed. 247.
(2) (1821) 9 Price, 169.
(3) (1877) 6 Ch. D. 638.
(4) (1866) L. R. 1 Ch. 252.
(5) (1755) 2 Ves. Sen. 627.
(6) (1881) 18 Ch. D. 188.
(7) [1895] 2 Q. B. 679.
(8) 5 De G. & Sm. 377.

COZENS-HARDY J
1899
BARRON v. WILLIS.

F. A. Milne, for the defendant Dunn.

Hughes, Q.C., in reply. The evidence establishes a confidential relation between the plaintiff and W. M. Skinner, and the onus is, therefore, thrown on him to shew that she had independent advice and was properly protected. This is established by the cases already cited, and by *Ellis* v. *Barker* (1); *Moxon* v. *Payne* (2); *Allcard* v. *Skinner* (3); *Morley* v. *Loughnan* (4); *De Witte* v. *Addison.* (5) *Nedby* v. *Nedby* (6) is inconsistent with the other authorities; if it is not, the plaintiff has sustained the onus thrown upon her. [He also referred to *Grigby* v. *Cox* (7); *Pybus* v. *Smith* (8); *Milnes* v. *Busk* (9); *Kempson* v. *Ashbee.* (10)

Cur. adv. vult.

July 6. COZENS-HARDY J. This is an action in which the plaintiff seeks to rectify or set aside a deed executed by her in 1891. It is necessary to state the admitted facts, and also the conclusion at which I have arrived as to the facts which are in dispute. [His Lordship stated the admitted facts as above set out, and continued:—]

The plaintiff, by her counsel, alleges that Mr. W. M. Skinner was her solicitor in reference to the deeds of 1891 and 1894, or at least that he was acting as her solicitor and confidential adviser at the time when those deeds were executed; that he did not in fact explain to her that by the deed of 1891 she was voluntarily parting with a portion of her life interest and the general power of appointment which, in the events which have happened, she, as the survivor, would have been entitled to exercise under the deed of 1890, and that it was Mr. Skinner's bounden duty to send her to another solicitor by whom she might be advised as to the propriety of the transaction; and that under the circumstances the deed of 1891, except so far as rectified by the deed of 1894, cannot stand, for Mr. Skinner's son benefited by the release of the general power of appoint-

(1) (1871) L. R. 7 Ch. 104.
(2) (1873) L. R. 8 Ch. 881.
(3) (1887) 36 Ch. D. 145.
(4) [1893] 1 Ch. 736.
(5) (1899) 80 L. T. 207.
(6) 5 De G. & Sm. 377.
(7) (1750) 1 Ves. Sen. 517.
(8) (1790) 1 Ves. 189.
(9) (1794) 2 Ves. 488.
(10) (1874) L. R. 10 Ch. 15.

ment, inasmuch as his reversionary interest was thereby rendered less liable to failure. The plaintiff was examined and cross-examined before me, and I am bound to say that I do not feel able to rely upon her testimony where she is directly contradicted by other witnesses. I do not propose to go in detail through the evidence, but the conclusions at which I have arrived upon the disputed facts are as follows: [His Lordship stated his conclusions as above set out, and continued:—]

It remains to consider the consequences which follow from these facts. Now, it has been long settled that a voluntary gift by a client to his solicitor, or to a member of the solicitor's family, while the confidential relation exists, cannot be supported unless the client had competent and independent advice, and that it is not enough to shew that the client understood what he was doing: see *Goddard* v. *Carlisle* (1) and *Liles* v. *Terry*. (2) If, therefore, the deed of 1890 had been challenged, I think the settlors might have set it aside, so far as the interest of Mr. Skinner's son is concerned, if not entirely. But no such case is made by the plaintiff. She claims under, and relies upon, the deed of 1890.

It is also settled by authority which binds me, although text-writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Baseley* (3) applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid. The onus probandi lies on the party who impugns the instrument, and not on the party who supports it. This was clearly decided by Sir James Parker in 1852 in *Nedby* v. *Nedby* (4), and it accords with what Lord Hardwicke said in *Grigby* v. *Cox*. (5) It is, moreover, consistent with the authorities which have recognised the validity of mortgages by a wife to secure her husband's debts, although a similar mortgage by a son just after attaining majority to secure his father's debts would not be upheld: see *Hudson* v. *Carmichael* (6), *Paget* v.

(1) 9 Price, 169.
(2) [1895] 2 Q. B. 679.
(3) 14 Ves. 273.
(4) 5 De G. & Sm. 377.
(5) 1 Ves. Sen. 517.
(6) (1854) Kay, 613.

COZENS-HARDY J.

1899

BARRON v. WILLIS.

Paget (1), *Baker* v. *Bradley* (2), and *Bainbrigge* v. *Browne*. (3) I think, therefore, that the deed of 1891, in so far as it is a transaction between the plaintiff and her husband, Joseph Willis, is a good deed.

It was strongly urged by Mr. Hughes in his very able argument that, even assuming the law to be so, it did not operate further than to validate that part of the deed of 1891 which gave to Joseph Willis an overriding general power of appointment for his own benefit. But, upon consideration, I do not think this distinction ought to prevail. The release of the general power of appointment which the plaintiff, if she survived her husband, would have had under the deed of 1890 was essential to give effect to his known desire. To reduce her life interest to an interest during widowhood and to leave her a power which she might exercise so as to enlarge this interest would have been absurd. The continuance of her general power of appointment was inconsistent with the idea that no strange man and none of her family should take the property. It was not intended that these people should be cut out if, and only if, the husband chose to exercise his new overriding power of appointment. I think the true arrangement made between the plaintiff and her husband in 1891 was carried into effect by means of an exercise of the joint power of appointment; a new general power of appointment was given to the husband alone, and the other general powers contained in the deed of 1890 were destroyed. This deed was prepared by Mr. Skinner as the husband's solicitor. It cannot be impeached except on the ground of Mr. Skinner's relation towards the plaintiff. In the view which I take, this is not material, the transaction being one between the plaintiff and her husband, and not between the plaintiff and Mr. Skinner or Mr. Skinner's son. But I think it right to add this—I am not satisfied that, until long after the execution of the deed of 1891, Mr. Skinner ever was or acted as the plaintiff's solicitor. It is not unimportant to observe that he never made any charge against her, and, although solicitors may act gratuitously, it is not usual for

(1) [1898] 1 Ch. 470. (2) (1855) 7 D. M. & G. 597.
(3) 18 Ch. D. 188.

them to do so. The plaintiff herself more than once said in the box that she did not employ Mr. Skinner as her solicitor; but I prefer not to rely solely upon her testimony on this or on any other point. I have seen Mr. Skinner, who gave his evidence very fairly. There are five occasions on which it is said that he acted as the plaintiff's solicitor: (1.) On September 12, 1890, she came with her husband, and there is an entry in his diary, "Attending Mr. and Mrs. Joseph Willis discussing and advising." Considering that the plaintiff had nothing to settle, and that Joseph Willis was his client, I attach no importance to this. (2.) On October 16, 1890, the plaintiff and her husband had a long conversation at Mr. Skinner's house; but to this also I attach no importance. (3.) In the spring of 1891 the plaintiff called upon Mr. Skinner and complained of her husband's conduct, and said she thought she should be compelled to separate, and asked what would be her position under the 1890 deed in that event. He told her it would be for the trustees to apply the income as they might think fit. I do not regard this as a business interview. It was a question asked by the plaintiff of one who was an intimate friend, and also a trustee under the deed. (4.) On September 9, 1891, the plaintiff came with her mother-in-law, Mrs. Ann Willis, and the entry in Mr. Skinner's diary is, "Mrs. Ann Willis and Mrs. Joseph Willis. Conference as to the unhappy differences between Mr. Joseph Willis and his wife." This was a matter in which Mrs. Ann Willis took a deep interest. She was Mr. Skinner's client. (5.) On September 12, 1891, the plaintiff went with her husband to Mr. Skinner's office.

I am not prepared to say that any or all of these attendances created or evidenced that fiduciary relation of solicitor and client between Mr. Skinner and the plaintiff to which such special disabilities are attached.

The rule of law expressed in *Liles* v. *Terry* (1) ought not to be applied in favour of a plaintiff who denies the relationship, and against a defendant who, except as a friend of the family, has only seen the plaintiff on a few occasions in company with persons who admittedly were his clients.

(1) [1895] 2 Q. B. 679.

COZENS-HARDY J.
1899
BARRON v. WILLIS.

If Mr. Skinner was not the plaintiff's solicitor, I think no relief can be claimed on the ground of his being a trustee of the deed of 1890.

The result is that, in my judgment, the action fails, whether Mr. Skinner was or was not the plaintiff's solicitor.

Solicitors for plaintiff: *Wynne-Baxter & Keeble, for Beldon & Ackroyd, Bradford.*

Solicitors for defendants: *Sismey & Sismey, for Skinner, Son & Church, Sunderland; Patersons, Snow, Bloxam & Kinder, for Ranson, Nelson & Maling, Sunderland.*

F. E.

COZENS-HARDY J.
1899
July 8, 22.

In re MADDOCK.
BUTT *v.* WRIGHT.

[1898 M. 43.]

Administration—Defendant Trustees—Severance on Further Consideration—Costs of Severance—Allowance of Two Counsel—Taxation.

On further consideration in an administration action a hostile order was sought against one of the defendant trustees. Thereupon the defendants severed, the trustee attacked appearing by two counsel and his co-trustee by one counsel. The attack failed, and the trustees were given their costs of the action as between solicitor and client, and also their costs of appearing separately. In taxing their costs the taxing master disallowed the costs of a leading counsel to the trustee attacked, being of opinion that one counsel for each trustee was sufficient. On summons to review:—

Held, that the trustee attacked was entitled to the costs of appearing by two counsel.

THIS was a summons by the defendants to review the taxation of their bill of costs. There were several objections, but the fifth objection alone called for a report.

The action was originally an ordinary administration action, but afterwards by arrangement was extended to other matters. The defendants Wright and Hull were the trustees and executors of the will of Elizabeth Maddock, the testatrix in the action. The minutes prepared by the plaintiff for the hearing on further consideration, and submitted to the defendants,

sought to take away from the defendants the conduct of certain sales, and also sought a very hostile order against the defendant Wright alone, which raised the question whether he was liable to pay some 2400*l.* into court. Thereupon the defendants appeared separately on the hearing on further consideration, the defendant Wright being represented by two counsel, and the defendant Hull by one counsel. The Court gave the conduct of the sale to the plaintiff, but not on the ground of any misconduct of the defendants, and the attack on the defendant Wright failed. The defendants were given their costs of the action as between solicitor and client, with a direction that the costs of their separate appearance on the further consideration were to be allowed. In taxing the costs of the defendants the taxing master disallowed the defendant Wright the costs of a leading counsel, being of opinion that one counsel for each of the defendants was sufficient. The defendants objected to this disallowance, and took out a summons to review.

The other material facts and the arguments are sufficiently noticed in the judgment.

Astbury, Q.C., and *MacConkey*, for the summons.
Hughes, Q.C., and *Preston*, for the plaintiff.

Cur. adv. vult.

July 22. COZENS-HARDY J. In this case I reserved my judgment upon the fifth objection to the registrar's certificate. He has disallowed the costs of two counsel for the defendant Wright. The material facts are as follows: The action was a creditor's action in point of form, but it is not clear at present whether there will or will not be any surplus after paying debts. The defendants are the trustees and executors of the will, and the defendant Wright is a member of the firm of solicitors who acted for the executors and trustees. I understand that the will contains a clause authorizing the solicitor-trustee to act and to be paid in the ordinary way; but this direction is, of course, inoperative as against creditors, and the benefit taken by the solicitor-defendant, or by his firm, is in the nature of a legacy.

COZENS-HARDY J.

1899

MADDOCK, *In re.* BUTT *v.* WRIGHT.

The action, although it began as a simple creditors' administration action, was by arrangement turned into a much more complicated proceeding, and raised the question of the validity of certain voluntary settlements of which the defendants are also trustees. The plaintiff, by minutes which he submitted before further consideration, sought to take away the conduct of the sales of the unsold property from the defendants, and sought to obtain a very hostile order against the defendant Wright alone in respect of a sum of upwards of 2400*l.*, which in the executorship accounts had been treated as expenses of executorship, and which represented sums paid to his firm for costs. When the matter came on on further consideration before Byrne J., he gave the plaintiff the conduct of the sales, but not, as I gather, by reason of any misconduct on the part of the trustees, for he gave the defendants their costs as between solicitor and client of the action. He also thought fit to direct that, in taxing the costs of the defendants in respect of their appearances on further consideration, the district registrar was to allow a separate set of costs to each of the defendants. This was, no doubt, due to the fact that the plaintiff sought a separate relief against the defendant Wright. With regard to the 2400*l.*, the Court drew no distinction between the defendants, but directed the bills to be taxed or moderated, and the registrar was, without prejudice to any question, to distinguish between profit costs and other costs charges and disbursements.

I think it is evident that there was a serious matter of litigation, between the plaintiff on the one hand and the defendant Wright on the other hand, involving a liability forthwith to pay into court a very considerable sum of money. This question was in substance decided against the plaintiff, and in favour of Wright. Now the registrar, in taxing the costs of the suit, allowed the plaintiff the costs of two counsel, but he has refused to allow the defendant Wright the costs of more than one counsel, notwithstanding Wright's position as trustee, and notwithstanding that the taxation is between solicitor and client. The registrar, in answer to the defendant's notice of

objection, states as follows: "The fact that the plaintiff has been allowed the fees of two counsel does not seem to me to be material. The plaintiff is a creditor administering the estate on behalf of the creditors. The persons beneficially interested in the estate other than the plaintiff appeared by one counsel only, as did Mr. Hull, one of the defendants, who appeared separately, and was allowed by the judge his costs of so doing. The two counsel, therefore, appeared for Mr. Wright alone, and inasmuch as he is only one of the trustees not beneficially interested, I do not, in the exercise of my discretion, consider he was justified in putting the estate to the expense of two counsel. The argument in Court, so far as the trustees were concerned, referred mostly to their own costs and the conduct of the sales, which was given by the judge to the plaintiff." That it is competent to the Court to overrule the decision of the taxing master in such a matter as this is clear. I may refer to *Kirkwood* v. *Webster* (1), where Fry J., on a party and party taxation, allowed the costs of a third counsel, which had been disallowed by the taxing master. But I have felt considerable doubt whether it is right for me to review the taxation in this respect, for I recognise fully that the discretion of an experienced taxing master ought not lightly to be interfered with. There are, however, circumstances in this case which I think justify me in referring it back to the registrar to allow the proper costs of a second counsel. When a trustee is attacked and sought to be rendered liable for a considerable sum of money, and when the attack fails, and the judge directs taxation of his solicitor and client costs, I think it is not reasonable to refuse to allow him the same assistance from counsel as the plaintiff, the attacking party. The registrar seems to me to have proceeded on a wrong principle, and to have been influenced by the fact that Byrne J. thought fit to allow a separate set of costs of the hearing on further consideration to each of the defendants; but I do not think this circumstance makes any difference. The right given to the defendant Hull to appear by separate counsel ought not to prejudice the

(1) (1878) 9 Ch. D. 239.

COZENS-HARDY J.

1899

MADDOCK, *In re.*

BUTT *v.* WRIGHT.

defendant Wright. The position of a trustee is at all times one of difficulty, and I am not disposed to say that Mr. Wright acted unreasonably or improperly in instructing two counsel to represent him.

Solicitors for plaintiff: *Gibbons & Arkle, Liverpool.*
Solicitors for defendants: *Wright, Becket & Co., Liverpool.*

H. L. F.

In re BANGOR AND NORTH WALES MUTUAL MARINE PROTECTION ASSOCIATION.

BAIRD'S CASE.

WRIGHT J.
1899
June 7, 14, 16.

[0064 of 1897.]

Company—Winding-up—Contributory—Company Limited by Guarantee—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 9, 38.

In the winding-up of a company limited by guarantee, a member is only liable to be placed on the list of contributories in respect of the amount which by the memorandum of association of the company he has undertaken to contribute in the event of its being wound up. Although he may be sued for sums which he is only bound to pay under the articles of association, he is not liable as a contributory in respect of such sums.

Maxwell's Case, (1874) L. R. 20 Eq. 585, and *McKewan's Case*, (1877) 6 Ch. D. 447, distinguished.

THE Bangor and North Wales Mutual Marine Protection Association, Limited, was registered on December 24, 1881, as a company limited by guarantee, and not having a capital divided into shares.

The primary object of the company was the mutual insurance of ships belonging to its members, and the memorandum of association contained the following clause: "Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding 1*l.* per cent. on the value of his tonnage indemnified in the association, at 15*l.* per ton."

By clause 1 of the articles of association, the association for the purpose of registration was declared to consist of 300 members, which number might be increased. By clause 4 of the articles, "Every person shall be deemed to have agreed to

WRIGHT J. 1899 BAIRD'S CASE.

become a member of the association who insures any ship or share of a ship in pursuance of the regulations hereinafter contained." The articles also provided that the secretary was to keep a register of members and ships insured, containing (inter alia) particulars of the name of the member and of his ship, the tonnage for which the ship was insured and the value thereof at 15*l.* per ton, and when and how the insurance ceased, and authorized him to admit members and ships for insurance. The following articles were also material: "11. The admission of a ship shall be deemed to have been effected and the member's right to insurance and liability to contribute shall begin at 12 o'clock at noon on the day of the date of its entry on the register: and such insurance and liability shall thenceforth continue without intermission until terminated in the manner hereinafter named."

"13. A member may withdraw his ship wholly or in part by giving not less than thirty days' written notice of his desire to withdraw on December 31 following, and, if such notice be given, this insurance and the liability to contribute to future claims shall cease on the expiration of such notice and the payment of all then unpaid subscriptions and (or) calls.

"14. In the event of the total loss of a ship her insurance and liability to contribute shall cease on the owner giving a written notice thereof, and on payment of all unpaid subscriptions and (or) calls."

Arts. 15–18 referred to the termination of membership or insurance on bankruptcy, or in certain events by notice from the directors after non-payment of subscriptions or calls. By art. 20 the insurance was mutual, each member's insurance by the other members being the consideration for his insuring them.

Other articles were as follows: "29. There shall be paid to the association for each ship on admission an entrance fee of 1*s.* per cent. on the sum insured, and on or before January 1 in every succeeding year the like sum of 1*s.* per cent.

"30. . . . . Calls shall be made for the payment of allowed claims and of current expenses at such dates as the directors may direct."

"33. If any member neglect or refuse to pay any subscription and (or) call, after demand made in writing (as provided by art. 32) the member so neglecting or refusing shall be excluded from all benefit in respect of any insurance affected by him, but he shall, notwithstanding such exclusion, remain liable for his contribution of any liability incurred during his membership.

"34. Unpaid subscriptions and (or) calls shall bear interest . . . . and shall be recoverable, with interest, by action at the suit of the association, although the defaulter may have ceased to be a member of the association."

"77. The calls on members for the payment of claims and for the necessary expenses of the association may be made in such manner and at such dates as the board in its discretion deems right; and payment thereof may be enforced by action at the suit of the association in any county court or in any division of the Supreme Court of Judicature."

On April 14, 1897, a compulsory winding-up order was made against the company, and the liquidator placed J. Baird and others on the list of contributories. Baird and some of the others applied to have their names taken off the list.

Baird had withdrawn his ships from insurance at the end of 1893, and no subscriptions or calls in respect of that year had ever been demanded from him. The liquidator claimed that there were calls due from him in respect of that year, and that he was entitled to place Baird on the list of contributories in respect of those calls.

Younger, for the applicants. Taking Baird's case as an example, the contention is that on the construction of the articles he ceased to be a member of the company at the end of 1893, and having ceased to be a member for more than one year prior to the commencement of the winding-up, s. 38, sub-s. 1, of the Companies Act, 1862, frees him from liability as a contributory, if he ever was so liable.

But he never was liable as a contributory in respect of the calls or subscriptions under the articles as distinguished from the memorandum of association. For such calls and subscriptions

WRIGHT J. 1899 BAIRD'S CASE.

he might perhaps be sued in an action, but he cannot be placed on the list of contributories in respect of them.

The company was formed on the principle of having the liability of its members limited by guarantee, and such a company is required by s. 9 of the Act of 1862 to insert in its memorandum of association "a declaration that each member undertakes to contribute to the assets of the company" in case of winding up "such amount as may be required, not exceeding a specified amount"—that is to say, specified in the memorandum of association. Then s. 38, dealing with the liability of members in a winding-up—that is, as contributories—says the liability shall be subject to certain qualifications, one of which is as follows: "5. In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association."

Sect. 74 defines "contributory" as meaning "every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up." There is nothing in the other parts of the Act which at all describes the persons who are to be liable except what is contained in s. 38, and it is therefore to the description contained in that section that s. 74 must be taken to refer: *In re Anglesea Colliery Co.* (1)

It is only, therefore, to the liability under the memorandum of association that the machinery of the Act as to the list of contributories (see s. 98 et seq.) applies—not to any liability under the articles alone. Such last-mentioned liability can only be enforced in an action: *Lion Mutual Marine Insurance Association* v. *Tucker*. (2)

A. J. Chitty, for the liquidator. Art. 13 enables a member to withdraw his ships, but does not say that he thereby ceases to be a member. It shews that his liability to contribute to future claims continues until payment of all unpaid subscriptions and calls. Baird undertook a statutory liability, and, having never ceased to be a member, he is liable as a contributory not only in respect of what he has guaranteed under the memorandum of association, but also what he has agreed to

(1) (1866) L. R. 1 Ch. 555, 559. (2) (1883) 12 Q. B. D. 176.

pay under the articles. Sect. 74 refers to liability to contribute "under this Act," and is not confined to liability under the memorandum of association: *In re Marlborough Club Co.* (1); *Maxwell's Case* (2); *McKewan's Case.* (3)

Younger, in reply. In the last two cases cited the company was formed under the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47).

Cur. adv. vult.

June 16. WRIGHT J. On the evidence and admissions in this case it must be taken, for the purpose of this application, that Baird duly withdrew his ships at the end of 1893, and that no subscriptions or calls in respect of 1893 have ever been demanded from him. But, as I understand the matter, I am asked to decide the case on the supposition that there are calls due from him in respect of 1893, the amount of which is, if necessary, to be the subject of an inquiry or action. Even on that supposition, he ceased to be a member at the end of 1893, unless by force of the 13th article of association he continued to be a member until payment of all due subscriptions and calls. The true construction of this article is not easy to determine. Membership seems ordinarily to be constituted by insurance of a ship, which insurance involves a corresponding liability to the other insured owners; but by art. 11 the insurance and liability are to continue until terminated "in the manner hereinafter named." These last words apparently refer to arts. 13 to 18. Art. 13 provides that "a member may withdraw his ship wholly or in part by giving not less than thirty days' written notice of his desire to withdraw on the 31st day of December following, and, if such notice be given, this insurance and the liability to contribute to future claims shall cease on the expiration of such notice and the payment of all then unpaid subscriptions and (or) calls." If this article is to be literally construed, it makes the insurance itself continue until calls in arrear are paid, although the ship has been withdrawn, and this without any further subscription. So, on the

(1) (1868) L. R. 5 Eq. 365. (2) L. R. 20 Eq. 585.
(3) 6 Ch. D. 447.

WRIGHT J. 1899 BAIRD'S CASE.

similar words in art. 14, the insurance of a ship which has been lost or sold would continue in like manner. I think that cannot be the true meaning. The meaning seems to me to be that the insurance and liability are to cease subject to the continuing liability for arrears of subscriptions or calls, which liability is by arts. 34 and 77 enforceable by action. It is to be observed that art. 13 does not in terms say that membership is to continue, and art. 34 shews that a person may have ceased to be a member although he is in arrear with his subscriptions or calls. I think, therefore, that Baird ceased to be a member at the end of 1893, although he may still be liable to actions for unpaid subscriptions or calls. Further, I think that, even assuming Baird to continue to be a member, he is not liable as a contributory beyond the amount prescribed by the memorandum of association. Sect. 38 of the Act of 1862 seems to me too clear to admit of much doubt. The two decisions of Malins V.-C. which were cited for the liquidator—namely, *Maxwell's Case* (1) and *McKewan's Case* (2)—turned upon a different Act and related to companies limited by shares. Whether they are authorities on the construction of the Act of 1862 even as to companies limited by shares, it is not necessary to consider. The case of *Lion Mutual Marine Insurance Association* v. *Tucker* (3) shews that he is liable to be sued for these losses, but it is not there suggested that he can be made a contributory in the winding-up in respect of them. He is a debtor to the company or to the other members in respect of them, not, as it seems to me, a contributory in the winding-up.

Solicitors for applicants: *Wynne, Holme & Wynne, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for liquidator: *Simpson & Co., for Hughes Pritchard & Rodway, Bangor.*

(1) L. R. 20 Eq. 585. (2) 6 Ch. D. 447.
(3) 12 Q. B. D. 176.

F. E.

In re CONSOLIDATED EXPLORATION AND FINANCE COMPANY.

WRIGHT J.

1899

July 27.

[0050 of 1899.]

Company—Winding-up—Costs—Instructions for Brief—Trial of Issue of Fact before Judge—Originating Summons—Rules of Supreme Court, 1883, *Order* LXXI., *r.* 1*a*; *Appendix N, Items* 81, 82, 82*a*.

A petition was presented for the compulsory winding-up of a company which was already in voluntary winding-up; but at the hearing the judge made no order except that the question was to be tried as on a summons under s. 138 of the Companies Act, 1862, "costs reserved"; he also fixed a certain date for the trial. On that date witnesses were examined, and the judge decided substantially in favour of the applicant with costs. No summons had so far been taken out, and on drawing up the order the registrar required a summons to be taken out in the voluntary winding-up. As an originating summons had previously been taken out by the liquidator for a private examination under s. 115 of the Act of 1862, on which an order had been made for an examination and reserving "liberty to apply," the registrar directed that the summons to be taken out and mentioned in the order was to be an ordinary and not an originating summons. On taxation the registrar disallowed the costs of instructions for brief:—

Held, by Wright J., that as the direction for trial treated the summons as issued in a "pending cause or matter," within the meaning of Rules of Supreme Court, 1883, Order LXXI., r. 1*a*, the summons was not an originating summons; that although, if Appendix N to the Rules, item 81, was construed strictly, it referred to an issue of fact directed to be tried as such, yet on taxation substance was to be regarded, and in substance the trial was of an issue of fact before a judge; and that the costs of instructions for the brief of the applicant's counsel must be allowed.

JOHN TROUP presented a petition asking that the Consolidated Exploration and Finance Company, Limited, might be wound up by the Court, or, in the alternative, that the voluntary winding-up of the company might be ordered to be continued under the supervision of the Court.

The petition was founded on a claim of Troup under a guarantee alleged to have been given by the respondent company in respect of dividends on shares in another company.

At the hearing of the petition before Wright J. on March 6, 1899, the result, as indorsed on the petitioner's counsel's brief,

WRIGHT J.
1899
CONSOLIDATED EXPLORATION AND FINANCE COMPANY, *In re.*

was, "No order on this petition except that question is to be tried as on a summons under s. 138 by the liquidator. Costs reserved." Another indorsement shewed that the trial was to be on March 17, 1899. The matter was heard on that day, when Wright J. ordered the voluntary liquidator to pay Troup 180*l.* and the costs of the application, except in so far as the same had (if at all) been increased by reason of the part of his claim which failed; but no costs of the petition were given. When the order came to be drawn up the registrar directed a summons to be taken out—which had not previously been done—but it was then discovered that a previous application had been made to the Court in the voluntary winding-up with reference to a private examination, and the order on that application reserved liberty to apply. The registrar, therefore, directed that an ordinary, and not an originating, summons should be issued under the liberty to apply. In taxing the costs, the registrar disallowed 5*l.* 5*s.* for "instructions for brief" at the hearing of March 17, 1899. The objections to the taxation left by Troup were as follows: "The disallowance of this item is objected to on principle, and not with regard to amount, on the ground that this was theoretically and in substance a brief on a trial of an issue of fact before a judge. The application was heard by way of summons under s. 138 of the Companies Act [1862] as being a matter arising in the liquidation which could be decided by the judge, and the issue of fact for trial was whether or not the applicant was entitled to prove for certain dividends which had been guaranteed by the company in liquidation. The issue involved the hearing and examination of witnesses in open court and the investigation of documents, and in every respect was conducted precisely upon the lines of a trial of an issue of fact before a judge, and the mere fact that no notice of trial has been given does not, it is submitted, affect the question—(1.) because under Appendix N of Rules of the Supreme Court, items 81, 82, the giving of notice of trial does not apply to issues of fact; (2.) because the formality of notice of trial was in effect dispensed with by the judge on the first occasion when the matter came before him, as he then directed it to be heard before him on a specific day. The practice in the Queen's

Bench Division is invariably to allow a fee for instructions for brief in numerous cases where no notice of trial is given, e.g., action set down for trial under Order XIV. in the short cause list, where no notice of trial is given; trial of an interpleader issue in Middlesex where no notice of trial is given; action set down under the rule for expediting trial where the master directs the action to be set down forthwith without any notice of trial and without pleadings."

The registrar's answer was: "This was an ordinary summons taken out in the liquidation proceedings which had been commenced by the liquidator by originating summons in November, 1898. The order made on the originating summons gave liberty to apply, and subsequent applications are made by ordinary summons according to the practice. There is no authority in Appendix N to the Rules of the Supreme Court for an allowance for instructions for brief on an ordinary summons." A summons to review the taxation was adjourned into court.

Hon. Frank Russell, for the applicant. Either the claim was raised by originating summons, or what was tried was an issue of fact before a judge.

Under the head of "Instructions" in Appendix N to the Rules of the Supreme Court, 1883, items 81, 82, and 82*a* are as follows: "81. For brief . . . . on trial of an issue of fact before a judge . . . ." "82. For such brief . . . . such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances or witnesses and procuring evidence." "82*a*. For brief on hearing of an originating summons, or hearing of a summons under s. 10 of the Companies (Winding-up) Act, 1890." The summons was really an originating summons. By the Rules of the Supreme Court, 1883, Order LXXI., r. 1*a*, "'Originating summons' means every summons other than a summons in a pending cause or matter." The winding-up petition was no longer pending, nor was the application for a private examination. The direction of March 6, 1899, contemplated the issuing of an originating

WRIGHT J. 1899

CONSOLIDATED EXPLORATION AND FINANCE COMPANY, *In re.*

summons, which is the mode in which applications in a voluntary winding-up are now made under s. 138 of the Companies Act, 1862: see Palmer's Company Precedents, 7th ed. Part II. p. 657.

If there was not an originating summons, there was a trial of an issue of fact before a judge. It was heard in court with witnesses.

Kenyon Parker, for the liquidator. The summons was not an originating summons. The direction on which the summons was issued was given on the petition to wind up, which was then "a pending cause or matter" within the Rules of the Supreme Court, 1883, Order LXXI., r. 1*a*.

Russell, in reply.

WRIGHT J. I do not think the summons can properly be treated as an originating summons, because the direction given treated it as if the summons had been issued in the matter of the petition. There was, therefore, a "pending cause or matter." But was not what took place the trial of an issue of fact before a judge? I question whether if that part of Appendix N is construed strictly it does not refer to the trial of an issue directed to be tried as such. I think that is the strict rule of construction applicable, but on taxation the substance rather than the form ought to be regarded, and, as I ordered the matter to be tried before myself, I think that in substance the trial was of an issue of fact before a judge, and that the costs of the instructions for brief must be allowed.

Solicitors for applicant: *Spyer & Sons.*

Solicitors for liquidator: *Ralph Raphael & Co.*

F. E.

URBAN DISTRICT COUNCIL OF TWICKENHAM *v.* MUNTON.

C. A. 1899 July 4.

[1898 T. 270.]

Street — Paving, &c. — Expenses — Apportionment — Frontager — Objection — Alteration of Scheme — Notice — Justices — Jurisdiction — Discretion — Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8, 11, 12, 13.

Where a resolution has been passed by an urban authority under s. 6, sub-s. 1, of the Private Street Works Act, 1892, approving the plans, sections, estimates, and provisional apportionments for making up the whole of a street, and the resolution has been published and copies thereof have been served on the frontagers under sub-s. 3, the justices have, on the hearing of an objection by a frontager under s. 7 that part of the street is repairable by the inhabitants at large, jurisdiction under s. 8, sub-s. 1, to amend the resolution, plans, &c., by limiting the scheme to the remaining portion of the street; and the urban authority can then carry out the amended scheme without it being necessary for them to begin their proceedings de novo or to pass a resolution approving the amended scheme.

Where, on the hearing of an objection to the original scheme, the justices have decided upon amending the scheme, the question whether or not, under s. 8, sub-s. 1, they shall adjourn the hearing and direct any further notices to be given, is a matter entirely within their discretion; but where the amendment is of a material character, it is desirable, though not obligatory upon them, that they should adjourn the hearing and direct further notices to be given in order that persons affected by the amended scheme may have an opportunity of being heard.

Decision of Stirling J., [1899] 1 Ch. 168, affirmed.

APPEAL by the defendants from the decision of Stirling J. (1)

R. Cunningham Glen, for the defendants, urged the same arguments as in the Court below. On the point that the plaintiffs were bound by their existing resolution to make up the whole road, and not a part only, he referred to *Whitchurch* v. *Fulham Board of Works*. (2) On the point that the powers given by the Private Street Works Act, 1892, could not be exercised without notice to the parties affected, he cited *Cooper* v. *Wandsworth Board of Works* (3), approved of in *Hopkins* v.

(1) [1899] 1 Ch. 168. (2) (1866) L. R. 1 Q. B. 233.
(3) (1863) 14 C. B. (N.S.) 180.

C. A. 1899 — TWICKENHAM URBAN COUNCIL v. MUNTON.

Smethwick Local Board of Health. (1) On the point that the statutory discretion given to the justices of adjourning the hearing and directing further notices carried a duty with it, he referred to *Julius* v. *Bishop of Oxford.* (2) The result of the amended resolution, plan, &c., would be that part only of the street would be made up, while the remainder would be left in a dilapidated condition.

Macmorran Q.C., and the *Hon. Frank Russell*, for the plaintiffs, were not called upon.

LINDLEY M.R. I take the view which the learned judge took in this case, although I cannot help thinking that it would have been much better if the justices had thought fit to adjourn the matter in order to give notice to persons who might be affected by the alteration they were making in the original scheme. The real question is as to the jurisdiction of the justices—not whether they acted irregularly, or whether it would have been better if they had acted otherwise than they did; and upon this question of jurisdiction it is impossible to get over the language of the Private Street Works Act, 1892.

The question turns on the true construction of s. 8, sub-s. 1. I do not propose to go through the other sections, although it is important to bear them in mind in order to understand what the machinery is. We agree with Stirling J. entirely on the construction which he has put upon the language of that part of s. 8, sub-s. 1, which says, "The Court"—that is the justices—"may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority."

Now, in this particular case a resolution had been passed to make up the whole road. The present appellants approved of that being done, and of course, therefore, did not object to it, for it was exactly what they desired; but some other owner did not like it and sent in an objection. The case therefore came before the justices and they amended the resolution, not in terms, but in effect, in such a way as to alter the scheme

(1) (1890) 24 Q. B. D. 712. (2) (1880) 5 App. Cas. 214.

from that of making up the whole road into a scheme for making up that portion only of the road which was a private road, leaving the other portion unmade up. That was done by the justices under the power which I have just read; and I have not the slightest doubt myself—and I do not think the language admits of any doubt—that they had ample power so to do. There were present before them the urban district authority on the one side, and the objector on the other, and they had ample power under s. 8, sub-s. 1, to "quash in whole or in part, or to amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority." So far there is no doubt at all as to the meaning of the sub-section.

Then comes that part of the sub-section which is more difficult to deal with: "The Court"—that is the justices—"may also, if it thinks fit, adjourn the hearing and direct any further notices to be given." Now, it is the practical application of that power which gives rise to the present difficulty. It appears to me that the language, "The Court may also, if it thinks fit, ..." gives the justices a discretion; that is to say, it puts them in this position, that they have to consider what sort of alteration they are going to make, and the practical operation of it on the people in the neighbourhood; and if they think that the occasion is one on which they ought to adjourn the hearing and give persons notice of what is going on so as to afford them an opportunity of objecting, then of course they ought to do so; but if, on looking into the matter, they think it is a small matter and one which does not require delay for further objection, then it appears to me that they are in fact the judges of whether an adjournment shall take place and whether further notice shall be given. To construe the Act differently would be to deprive them, as it appears to me, of the power of deciding such a matter as this. It is contended that if the justices make any serious alteration in the resolution, plans, and so on, inasmuch as it may affect other people, they are bound to adjourn the hearing and direct further notices to be given. But that is not what the Act says. The Act has reposed in the Court, that is, in the justices, the power to say

C. A. 1899 TWICKENHAM URBAN COUNCIL v. MUNTON. Lindley M.R.

whether the amendment they make or the apportionment they make is of such a character that justice requires that further notice shall be given. I regret that the justices here did not take the opposite view, but when we are asked to say that their omission to adjourn the hearing and to direct further notices to be given has rendered the amended scheme invalid, and that they had no jurisdiction to act as they did, we cannot go so far as that. This appeal must therefore be dismissed.

SIR F. H. JEUNE. I agree with the judgment that has been delivered, but I confess my sympathies are entirely with the appellants. It seems to me that on the argument presented on this summons this may be said, and with considerable force, at any rate with great plausibility, that although it is quite true the justices may, under the discretion given to them by s. 8, sub-s. 1, of the Act, quash in whole or in part or may amend the resolution, and so on, yet that is subject to the previous general provision in the sub-section that the Court cannot properly act without hearing those who may object, and if they so act then their decision is ultra vires and void. And it may further be said that the latter part of the sub-section was not intended to cut down that obligation, but rather to provide means for carrying it out, and that therefore the justices are bound to give the notices which will enable them to hear further objections. I think that is a plausible argument, but I am bound to say that, in my judgment, I cannot give effect to it without putting on the Act a construction which it will not bear. I believe the intention of the Act was this, that inasmuch as the justices might desire to alter the original resolution, plans, and so on, there might be cases in which other persons not before the justices would be affected by the alteration, but as it would be impossible for the justices, without having all the facts before them, to say whether there would be such cases or not, the Act intended that the question of adjournment should be left to their discretion. It is necessary that somebody should decide such a matter, and it may well be that this Act of Parliament intended to give that discretion to the justices, and in truth they are the best persons to consider

it. Therefore the whole scope of the Act appears to me to be, not to cut down the obligation in a proper case, but to confer on the justices the power of saying whether or no anybody else ought to be heard, and whether any further notice should be given.

In this case I must take it that the justices, having the matter before them, thought there was no obligation to give any such notice. There was no duty on them to give a hearing to anybody else. I think, as the Master of the Rolls says, it is a great pity they did not give the appellants the opportunity of saying all they had to say about the matter, but they came to a conclusion, and under the circumstances it appears to me they only exercised the discretion which the Act, rightly or wrongly, plainly contemplates they should exercise.

Under these circumstances Stirling J. is right, and for the reasons he has given.

ROMER L.J. I agree in thinking that the decision of my brother Stirling J. is quite correct in this case, and I do not desire to add anything to what he has said.

Solicitors: *Munton & Morris; Ruston, Clark & Ruston.*

G. I. F. C.

C. A.
1899
Oct. 26.

ROBERTS *v.* GWYRFAI DISTRICT COUNCIL.

[1898 R. 586.]

Riparian Proprietor—Alteration of Flow of Stream—Local Authority—"Injuriously Affecting"—Injunction—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 332.

Under s. 51 of the Public Health Act, 1875, a local authority have no power, for the purpose of supplying water to their district, to alter the flow of water in a stream without the consent in writing of the riparian proprietors lower down the stream, as required by s. 332 of the Act.

By so altering the flow of water the local authority are, within the meaning of s. 332, "injuriously affecting" the common law right of such a riparian proprietor, and they will be restrained from so doing without any proof of sensible damage caused to him.

Decision of Kekewich J., [1899] 1 Ch. 583, affirmed.

APPEAL by the defendants against the judgment of Kekewich J. at the trial of the action. (1)

The plaintiff was the owner and occupier of an ancient water-mill, with lands belonging thereto, in Carnarvonshire, and he claimed, as riparian owner and occupier of the same, to be entitled to the natural flow of a stream which ran past his mill from a lake called Llyn Cwmdulyn, situate at the foot of a mountain some distance above the mill, the stream being utilized for driving the mill.

In May, 1893, the defendants, who had obtained a lease of the lake from the Crown, and also a lease of adjoining land for the purpose of increasing the size of the lake, informed the plaintiff of their intention to take water from the lake for the purpose of supplying some villages in their district with water, and applied to him for his written consent thereto, under s. 332 of the Public Health Act, 1875; but he refused to give his consent. Thereupon the defendants, without any further notice to the plaintiff, laid down pipes, and under, as they said, a licence granted by the Crown in 1896, constructed a dam across the end of the lake, of which the stream in question formed the natural outlet, so as to increase the water storage,

(1) [1899] 1 Ch. 583.

a sluice being placed in the dam to regulate the outflow from the lake. The area of the lake was considerably increased by the defendants' works, and its capacity (it was stated) was increased by 67,000,000 gallons.

The plaintiff, on March 30, 1898, issued the writ in this action, claiming an injunction to restrain the defendants from taking any water from the lake, and from doing any act whereby the flow of water in the stream through and by the plaintiff's mill and lands would be diminished.

The defendants, as lessees and occupiers of land adjoining the lake, claimed riparian and other rights in the lake, including the right to take water therefrom for supplying their district, so far as they could do so without causing damage to other riparian owners. They denied that they had done, or were intending to do, anything whereby the flow of water in the stream past the plaintiff's mill had been or would be diminished, or so as to cause any damage to the plaintiff.

At the trial it was admitted that the plaintiff had not yet suffered any actual damage, and that the defendants' dam had been properly constructed for the purpose they had in view; also that an arrangement had been made by means of the sluice for providing a regulated flow of water down the stream. This, the defendants' witnesses said, would give the plaintiff a constant supply, instead of an intermittent one, which he admitted had sometimes occurred in dry seasons. The plaintiff, however, insisted that he was entitled as of right to the flow of water past his mill unimpeded and uncontrolled in any way by the defendants.

It was admitted by the defendants' witnesses that the supply of the defendants' district would cause the abstraction of about one-sixteenth of the water in the lake, and about half of the increased amount of water.

Kekewich J. granted an injunction perpetually restraining the defendants, their servants, &c., "from taking any water from the lake for the purpose of supplying their district with water, and from doing any other act for that purpose whereby the flow of water in the stream through and by the plaintiff's mill and lands shall be diminished."

C. A. 1899

ROBERTS v. GWYRFAI DISTRICT COUNCIL.

The operation of the injunction was suspended until after the appeal should have been disposed of.

Renshaw, Q.C., and *H. Courthope-Munroe*, for the defendants. The learned judge proceeded on the principle that a riparian proprietor is entitled to all the water which would naturally flow down to him, subject to the right of the other riparian proprietors higher up the stream to a reasonable use of the water. But that which the defendants have done has really improved the flow of water to the plaintiff's mill. The flow of water is now regular, instead of being intermittent—in times of flood too much, in times of drought little or none at all. It is admitted that, under s. 51 (1) of the Public Health Act, 1875, the defendants have no compulsory power to take water for the supply of their district. But by what they are doing they are not, within s. 332, "injuriously affecting" the stream or the flow of water to the plaintiff, and the injunction granted is at any rate too wide. It should at any rate be qualified by some such words as "so as to injuriously affect" the flow of water to the plaintiff's mill. The evidence does not shew that the plaintiff has sustained any sensible damage.

[LINDLEY M.R. The injunction does not affect your common law right as riparian proprietors.]

The plaintiff's right is fully protected by s. 332.

[ROMER L.J. He does not need that section to protect him. You are only entitled to exercise your proprietary rights.

LINDLEY M.R. What you are now doing may by lapse of time grow into a right.

(1) Sect. 51 empowers a rural authority to provide their district "with a supply of water proper and sufficient for public and private purposes," and for those purposes (inter alia) to "construct and maintain waterworks, dig wells, and do any other necessary acts."

By s. 332, "Nothing in this Act shall be construed to authorize any local authority to injuriously affect any reservoir canal river or stream or the feeders thereof, or the supply, quality or fall of water contained in any reservoir canal river stream or in the feeders thereof, in cases where any body of persons or person would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir canal river stream feeders or such supply quality or fall of water, unless the local authority first obtain the consent in writing of the body of persons or person so entitled as aforesaid."

ROMER L.J. Is not any riparian proprietor entitled to prevent a riparian proprietor higher up the stream from acquiring by prescription a right in excess of his ordinary proprietary right?]

Under s. 51 of the Public Health Act a local authority have power to construct a reservoir for the supply of water to their district, provided (s. 332) they do not "injuriously affect" the supply of water to any person who, but for the Act, would have been entitled to prevent that injuriously affecting. "Injuriously affect" in s. 332 must have the same meaning as in s. 68 of the Lands Clauses Consolidation Act, 1845: *McCarthy* v. *Metropolitan Board of Works*. (1) There Bramwell B. said (2): "The act injuriously affecting must be one which would be wrongful but for the statute." In *Earl of Sandwich* v. *Great Northern Ry. Co.* (3) it was held that a railway company, whose line crossed a stream in the immediate neighbourhood of one of their stations, were entitled, as riparian owners, to take a reasonable quantity of water from the stream for supplying their engines and for the general purposes of the station.

[ROMER L.J. Is it a reasonable use of your right as riparian proprietors to take water to supply a township which may be miles away from the lake?]

It might not be a reasonable use if we had not given the plaintiff something else. In *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (4) the canal company claimed the right to take the whole of the water of a stream. We do not claim the right to do any damage to the plaintiff. We claim only to be entitled to take water so long as we do not injuriously affect the plaintiff. That claim is consistent with the form of the injunction granted in *Owen* v. *Davies*. (5)

At any rate, admitting that the defendants have no legal right, either as riparian proprietors or under the Act, to take the water, the Court will not interfere by injunction when, as Lord Cairns said (6), no sensible damage is done to the plaintiff. Here the plaintiff is really benefited by there being 30,000,000

(1) (1872) L. R. 8 C. P. 191.
(2) Ibid. 209.
(3) (1878) 10 Ch. D. 707.
(4) (1875) L. R. 7 H. L. 697.
(5) W. N. (1874) 175.
(6) L. R. 7 H. L. 705.

C. A. 1899 ROBERTS v. GWYRFAI DISTRICT COUNCIL.

gallons more water in the lake and the flow of water being rendered regular.

[They also referred to *Grand Junction Canal Co.* v. *Shugar* (1) and *John Young & Co.* v. *Bankier Distillery Co.* (2)]

Warrington, Q.C., and *Bryn Roberts*, for the plaintiff, were not heard.

LINDLEY M.R. This case has taken a somewhat unusual turn, but we have only to consider the rights of the parties.

What are those rights? The right of the plaintiff as the owner and occupier of his mill is to have the water flow down the stream, which has its origin in the lake, in the accustomed way. That right is subject to the rights of the other riparian proprietors higher up the stream; but, subject to those rights, there is no right whatever to alter the flow of the water in its old accustomed way. If it is said that the alteration of the old flow is an improvement, that is a matter of opinion. There is no right to interfere with the accustomed flow of the water.

Now, the defendants are certainly doing that. How do they justify it? First, as riparian proprietors. It seems to me that as riparian proprietors it is impossible for them to justify what they are doing. Whether you take the measure of the rights of a riparian proprietor as stated by Lord Kingsdown in his excellent judgment in *Miner* v. *Gilmour* (3), or as it is stated in some of the later cases in which his exposition of the law has been more or less adopted and expanded, appears to me immaterial. The defendants (apart from any statutory power) are not exercising the rights of riparian proprietors at all. They are diverting the water from the lake, not for their own purposes, nor for the use, either ordinary or extraordinary, of the land of which they are owners, but for a totally different purpose, namely, supplying with water the inhabitants of townships situate some distance away. That is not an exercise of the right of a riparian proprietor within the law as laid down in the cases to which I have referred. In *Swindon Waterworks*

(1) (1871) L. R. 6 Ch. 483. (2) [1893] A. C. 691.
(3) 12 Moo. P. C. 131, 156.

Co. v. *Wilts and Berks Canal Navigation Co.* (1) Lord Cairns (2) alluded to the distinction. He said: "I think your Lordships will find that, in the present case, you have no difficulty in saying whether the use which has been made of the water by the upper owner comes under the range of those authorities which deal with cases such as I have supposed, cases of irrigation and cases of manufacture. Those were cases where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the appellants of the water, and the use which they claim the right to make of it, is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream—as great a diversion as if they had changed the entire watershed of the country, and, in place of allowing the stream to flow towards the south, had altered it near its source, so as to make it flow towards the north." He said that the use which was being made of the water by the waterworks company was not a use in the exercise of their rights as riparian proprietors, but for a totally different purpose. So it is here. Therefore I think the defendants cannot justify what they are doing under the common law doctrine as to riparian owners. They are far exceeding any rights which can be based upon that ground.

Then the defendants say they can justify what they are doing under s. 51 of the Public Health Act, 1875, which enables them to construct waterworks to supply water to their district, subject, however, to the provision contained in s. 332, that they must not "injuriously affect" the rights of other persons. What, then, do they say? Mr. Renshaw has very fairly claimed for the defendants the right to do what they have done either as riparian proprietor or under the Public Health Act. But, in my opinion, the defendants cannot in either way acquire a right to alter the flow of the water to the injury of the rights of other people. Mr. Courthope-Munroe admitted that the defendants had no right to do what they have done; but he said that the plaintiff is not entitled to complain. That depends entirely upon whether the plaintiff's rights have or

(1) L. R. 7 H. L. 697. (2) L. R. 7 H. L. 704.

C. A. 1899 — ROBERTS v. GWYRFAI DISTRICT COUNCIL. — Lindley M.R.

have not been infringed. In my opinion these rights have been infringed, for, although Mr. Munroe's view is that the defendants are not entitled to do what they have done, they have in fact most materially altered the flow of the water to which the plaintiff is entitled. His rights are infringed by persons who admit that they have no right to do what they are doing; and under such circumstances, unless the infringers are prepared to stop what they are doing, an injunction to restrain them is almost a matter of course. That is warranted by what Lord Cairns said in the *Swindon Case*. (1) I cannot appreciate the difference, for the present purpose, between claiming a right to do a thing, and saying, "I admit I have no right to do it, but I intend to go on doing it." If there is any difference, it is rather against the man who admits that he has no right to do a thing, but insists on doing that which he admits to be wrong. In the *Swindon Case* (1) Lord Cairns pointed out that there the waterworks company did claim a right, and he said that, after that claim of right, "it appears to me that it is impossible that the Court can do otherwise than decide the issue which is thus raised between the parties. It is a matter quite immaterial whether, as riparian owners of Wayte's tenement, any injury has now been sustained, or has not been sustained by the respondents. If the appellants are right, they would, at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of the property, the riparian right of Wayte's tenement. That is a consequence which the owner of Wayte's tenement has the right to come into the Court of Chancery to get restrained at once, by injunction, or declaration, as the case may be." How is the Court to deal with a man who says, "I admit I have no right to do this, but I intend to go on doing it all the same"? If he is infringing the plaintiff's right, it is the duty of the Court to protect the plaintiff. I know of no duty of the Court which it is more important to observe, and no power of the Court which it is more important to enforce, than its power of keeping public bodies within their rights. The moment public bodies exceed their rights they do so to the

(1) L. R. 7 H. L. 705.

injury and oppression of private individuals, and those persons are entitled to be protected from injury arising from such operations of public bodies.

It has been suggested that the injunction ought to be qualified by inserting the words, "so as to injure the plaintiff." But if the plaintiff's rights are infringed, and the defendants intend to go on infringing them, I do not see either the necessity or the advisability of inserting those words. On the other hand, the defendants say they are justified in doing what they are doing, and that they are entitled to do it by the necessities of the case. There is, however, a proper mode of obtaining power to do it—namely, to apply to Parliament for authority to do it. The defendants say that a rural district council have no power to promote a bill in Parliament. That only prevents them from paying the expenses out of the rates. But it is a very common thing for public bodies to bring in bills, although they have no power to pay the expenses. There are methods of escaping from that difficulty, and, if the defendants desire to apply to Parliament to authorize them to do what they are doing, we should, of course, suspend the operation of the injunction. I propose, therefore, with the sanction of my brethren, to dismiss the appeal with costs, but the order shall not be drawn up for a week; and, if at the end of the week we are told that the defendants desire to apply to Parliament for further powers, the operation of the injunction will be suspended for sufficient time to give them an opportunity of so doing. But it is our bounden duty to see that the defendants do not exceed their rights.

SIR F. H. JEUNE. I agree.

ROMER L.J. I also agree.

Solicitors: *Robbins, Billing & Co., for Morris Owen, Carnarvon; Hamlin, Grammer & Hamlin, for Carter, Mostyn, Roberts, Vincent & Co., Carnarvon.*

W. L. C.

C. A. 1899 July 14.

BURDETT-COUTTS *v.* TRUE BLUE (HANNAN'S) GOLD MINE.

[1899 B. 2363.]

Company—Reconstruction—Scheme—Agreement—Transfer or Sale of Undertaking to New Company—Shares in New Company, Application for—Time Limit—Appropriation by New Company of Unclaimed Shares—Shareholders of Old Company, Rights of—Forfeiture of Shares—Ultra Vires—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

Where, on the voluntary winding-up of a company, a reconstruction agreement is entered into, pursuant to a special resolution under s. 161 of the Companies Act, 1862, between that company and its liquidator of the one part and the new company of the other part, for carrying out a transfer or sale of the undertaking of the old company to the new, and providing that every holder of shares in the old company "shall be entitled as of right" to claim an allotment of an equivalent number of shares in the new company, further provisions fixing the time within which the application for shares must be sent in to the new company, and placing the shares not applied for within that time at the disposal of the new company, are not ultra vires; and therefore a member of the old company who is not a dissentient member within the proviso in the section, and whose application is out of time either through negligence or accident, such as absence abroad or illness, cannot compel the new company to allot him the shares.

But whether, on an application to sanction a proposed scheme of reconstruction containing a clause placing shares not applied for by members of the old company within a stipulated time at the disposal of the new company, the Court will sanction such a clause without some modification for the protection of members of the old company, *quære*.

Observations of Lord Esher M.R. in *Nicholl* v. *Eberhardt Co.*, (1889) 61 L. T. 489; 1 Megone, 402, not followed.

Decision of Kekewich J. reversed.

By a reconstruction agreement made on April 24, 1899, between the True Blue (Hannan's) Gold Mine, Limited (hereinafter called "the old company") and its liquidator of the one part, and the True Blue (Hannan's) Gold Mine, Limited (hereinafter called "the new company"), of the other part, after reciting the incorporation of the old company in 1895 with a nominal capital of 125,000*l.* divided into 125,000 shares of 1*l.* each, and the issue and payment in full of the whole of such

shares, and reciting certain special resolutions passed and confirmed at extraordinary general meetings held on March 29, 1899, and April 19, 1899, resolving on the reconstruction and voluntary winding-up of the old company, appointing a liquidator, authorizing him to consent to the registration of the new company with a memorandum and articles of association as therein mentioned, approving the draft of the present agreement, and authorizing the liquidator, pursuant to s. 161 of the Companies Act, 1862, to enter into such agreement with the new company when incorporated and to carry the same into effect, and reciting the incorporation of the new company with a nominal capital of 125,000*l.* divided into 125,000 shares of 1*l.* each, and that the articles of association of the new company provided that it should enter into this agreement, it was agreed that—

(1.) The old company and its liquidator should transfer, and the new company should take over, the property and undertaking of the old company:

(2.) As a part of the consideration for the said transfer, the new company should undertake to pay, satisfy, and discharge the debts, liabilities, and obligations of the old company, and keep the old company, its liquidator and contributories, indemnified therefrom:

(3.) As a further part of the consideration for the said transfer, the new company should pay and keep the old company, its liquidator and contributories, indemnified against all costs and expenses incident to the winding-up and carrying the said transfer into effect:

"(4.) As the residue of the consideration for the said transfer, every member of the old company shall, in respect of each share therein held by him, be entitled as of right to claim an allotment to himself or herself, or to his or her nominee or nominees, of one 1*l.* share in the new company with the sum of 17*s.* credited as having been paid up thereon, and the new company shall allot the shares so claimed:

"(5.) A member entitled to claim an allotment as aforesaid must claim the same within twenty-one days from the date hereof, or such further time (not exceeding fourteen days) as

C. A. 1899 — BURDETT-COUTTS v. TRUE BLUE (HANNAN'S) GOLD MINE.

the new company shall determine, by sending in to the new company a claim in writing for the allotment of the shares, and such claim must be signed by the member making the same, and must be accompanied by a sum of 1*s.* per share claimed . . . .:

" (6.) The liquidator of the old company shall, within seven days from the date hereof, give notice in writing to each member of the old company stating the number of shares which the member is entitled to claim as of right under this agreement, and the amount per share payable on claiming the same, and the time within which the claim for an allotment must be sent in to the new company, and there must be inclosed therewith proper forms of claim addressed to the new company for signature by the member. The notice aforesaid shall in each case be given by sending the same through the post addressed to the member at his or her registered address . . . .:

" (7.) The liquidator of the old company shall at the same time as he gives the said notice invite the members of the old company (other than the members who shall effectually dissent from the special resolutions aforesaid, and in accordance with the provisions of s. 161 of the Companies Act, 1862, hereinafter called 'the dissentient members') to apply for such of the said shares of the new company as, but for their dissent, would have been claimable by the dissentient members, and also such of the said shares as the members of the old company other than dissentient members shall be entitled to claim as aforesaid, but shall not within the period of twenty-one days before mentioned, or such further time as aforesaid, claim (all which last-mentioned two classes of shares are hereinafter referred to as 'the surplus shares'), and proper forms of application shall accompany such invitation. Every such application for surplus shares must be made in writing addressed to the new company, and must mention the number of surplus shares which the member making the application shall be willing to take, and must be delivered to the new company within twenty-one days from the date hereof, and must be accompanied by a remittance of 1*s.* per share applied for. In the event of more shares being so applied for than there should eventually be surplus shares,

the new company shall, so far as may be practicable, accept such applications rateably, having regard to the holdings in the old company of the members making the application; and the new company shall allot the shares applied for under this clause to the members of the old company whose applications shall be accepted, credited as aforesaid. The new company shall be under no obligation to accept any such application; and if any such application be refused, or accepted as to some only of the shares applied for, the sum remitted with the application, or the due proportion thereof (as the case may be), shall be immediately returned to the member remitting the same.

"(8.) Such (if any) of the shares of the new company as members of the old company, other than dissentient members hereinafter mentioned, shall be entitled to claim as aforesaid, but shall not, within the period of twenty-one days before mentioned, claim, and as shall not be allotted under clause 7, shall be allotted by the new company to Walton FitzJames Turner in accordance with the terms of an agreement dated March 23, 1899." (Under that agreement of March 23, 1899, Turner, who was a large shareholder in the old company, was the underwriter of the "surplus shares.")

"(11.) Provided always that the old company and its liquidator shall have a lien upon the whole of the property thereby agreed to be transferred for all moneys (if any) payable to dissentient members under ss. 161 and 162 of the Companies Act, 1862, and until the same shall have been paid the said liquidator shall be at liberty to retain possession of all or any part of the said property, and thereout at his discretion to raise and pay such money or any part thereof."

The notices, with separate forms of application for original and surplus shares, were duly sent out by the liquidator of the old company on April 26, 1899. They required the applications to be sent in by May 17—i.e., two days later than the date fixed by the agreement.

The plaintiff, who was a holder of 500 shares in the old company, and had not dissented from the special resolutions for winding-up and reconstruction, duly received the notice

C. A. 1899 BURDETT-COUTTS v. TRUE BLUE (HANNAN'S) GOLD MINE.

and application forms. In answer to the notice he filled up and sent in to the new company his application for an allotment of 500 original shares in that company, accompanied by a remittance of 1*s.* per share, but he did not do so until after the expiration of the time fixed by the notice. Consequently his application was refused, and it was proposed to deal with the shares pursuant to clause 8 of the agreement. He then issued the writ in this action on June 6, 1899, against the old company and its liquidator, the new company, and Turner, the underwriter, and on June 23 moved for an injunction to restrain them, until the trial of the action, from dealing with any shares in the new company without first providing for the plaintiff's claim to have 500 shares in the new company (paid up to the extent of 17*s.* per share) transferred or allotted to him.

The plaintiff in an affidavit admitted having received a notice and forms of application for both original and surplus shares, but stated that, being at the end of April and the beginning of May, 1899, extremely busy in connection with stud sales and other matters, and being about to proceed abroad (which he did on May 19), he put aside the papers without reading them, but with the intention of attending to them in a few days' time; and that until May 26, when, on his return from abroad, he came across them, he forgot all about them. Upon their then coming to his notice, he filled up and forwarded his application for 500 original shares in the new company. It appeared that a large number of shareholders in the old company had applied for "surplus shares."

Upon the hearing of the motion on June 23, 1899, Kekewich J. held that the provisions of the agreement were not effectual to preclude the plaintiff from claiming his shares, and accordingly granted an injunction as asked.

The defendants, the old company and its liquidator, the new company, and Turner, the underwriter, appealed separately.

The three appeals were heard on July 14, 1899.

Rowden, Q.C., and *B. K. R. Wilkinson*, for the appellants, the old company and its liquidator. First, the plaintiff is bound

by estoppel from impeaching the scheme constituted by the agreement, for not only has he not dissented from it, but he now claims to take the benefit of it. He cannot approbate and reprobate. Secondly, there is nothing ultra vires in a reconstruction scheme of this kind, which is authorized by s. 161 of the Companies Act, 1862 (1), and is in the ordinary terms, providing a certain time within which shareholders of the old company may come in and apply for shares in the new, and for the disposal of shares which have not been applied for

(1) Sect. 161 of the Companies Act, 1862, is as follows: "Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution; no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court."

C. A. 1899 — BURDETT-COUTTS v. TRUE BLUE (HANNAN'S) GOLD MINE.

within that time: *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (1); *Weston* v. *New Guston Co.* (2) A time limit is essential to the carrying out of a reconstruction scheme, and in the latter case cited it was held that, even if no time limit is fixed by the scheme, one must be implied. A reconstruction agreement under s. 161 is absolutely binding on all the members of the old company except those who dissent: *In re City and County Investment Co.* (3)—just as in the case of an agreement under s. 2 of the Joint Stock Companies Arrangement Act, 1870: *Nicholl* v. *Eberhardt Co.* (4)

[They were stopped by the Court.]

Eve, Q.C., and *Peterson*, for the appellants, the new company, in the same interest.

A. R. Kirby, for the appellant Turner, the underwriter, also in the same interest.

P. O. Lawrence, Q.C., and *Austen-Cartmell*, for the plaintiff. We submit that the agreement is ultra vires in putting it out of the power of the new company in certain events to give a member of the old company what he is entitled to as part of the consideration to be paid or given by the new company on taking over the undertaking of the old. In particular, clauses 7 and 8 are bad, because they provide that shares to which members of the old company are "entitled as of right" as part of the consideration are to be at the disposal of the new company. Again, it is unjust that members of the old company should be debarred by a time limit from claiming shares to which they are "entitled as of right," for it is quite possible that a claimant might be out of time merely through illness or, as in the present case, through absence abroad. In *Nicholl* v. *Eberhardt Co.* (4), where there was a scheme like this, Lord Esher M.R. doubted whether it was not ultra vires for the directors of the new company to determine the time within which applications for shares must be made by members of the old company, or whether shares not applied for by members of the old company could be at the disposal of the new company.

(1) (1889) 43 Ch. D. 452.
(2) (1889) 62 L. T. 275; 1 Megone, 352; (H.L.) (1891) 64 L. T. 815.
(3) (1879) 13 Ch. D. 475, 481.
(4) 61 L. T. 489.

In *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (1) it was held that a company had no power to alter the rights of shareholders under its memorandum and articles, nor to fix a time within which shares must be applied for. Stirling J. expressly said (2) he did not intend to depart from *Griffith* v. *Paget* (3), where it was held that, on a sale under s. 161, the rights of all the shareholders in the selling company, without exception, must be regarded. The present agreement practically creates a forfeiture of shares of a member of the old company.

Rowden, Q.C., in reply. There is nothing ultra vires about clauses 7 and 8 of the agreement, and it is a legitimate business "arrangement" within s. 161.

LINDLEY M.R. I think the appellants are entitled to succeed. In my opinion it is impossible to take the view that this scheme is open to the objection in point of law which Mr. Lawrence has urged. First of all, it is to be borne in mind that we are not asked to approve a scheme. It is said that the working of some of the provisions of this scheme is, or at all events may be, in some cases hard. If we were being asked to approve this scheme, we might listen to that objection, and see whether we should modify its provisions in any way; but that is not our present function. The scheme has been considered and passed, and has become binding, if it can become binding; and therefore the question whether it is binding is purely one of law.

In order to settle that question we must look, first of all, at the section of the Act of Parliament which authorizes a scheme of reconstruction, and see whether this scheme comes within the authority which the Legislature has conferred upon the majority of shareholders in a winding-up after proper notices have been given. The section applicable to the case is s. 161 of the Companies Act, 1862, which says this: [His Lordship read the section, and continued:—]

Now, in the present case, what is this "scheme of reconstruction," as it is called? The old company is being wound up,

(1) 43 Ch. D. 452. (2) 43 Ch. D. 468–9.
(3) (1877) 5 Ch. D. 894.

C. A. 1899 — BURDETT-COUTTS v. TRUE BLUE (HANNAN'S) GOLD MINE. — Lindley M.R.

and the scheme is this: that the old company is to transfer in the usual way all its assets to the new company, and, as part of the consideration, the new company is to pay and satisfy all the debts and liabilities of the old company and indemnify it, and so on. Then comes the rest of the consideration—the part which, so far as the shareholders in the old company are concerned, is the most important, being comprised in clause 4 of the agreement. [His Lordship read the clause, and continued:—] Here there is no preference, or anything of the sort, among the members of the old company: they are all treated as on exactly the same footing, and each is entitled "as of right" to claim an allotment of a share in the new company in respect of each share held by him in the old. He is not entitled to have it without asking for it, but he is entitled to claim it. Then clause 5 provides when and how the claim is to be made. [His Lordship read the clause, and continued:—] This clause, therefore, limits the time within which the claim must be made. Now, pausing there for a moment, it is in practice and as a matter of business impossible to work out arrangements of this kind unless a time for making and sending in such claims is fixed. A time which is so short as to be unreasonable would be a ground for objecting to the scheme; but without some kind of limit it is practically impossible to work these schemes through. In fact, it has been decided, not now for the first time, but on previous occasions, that there is no objection to such a provision; and when one bears in mind that, if no time were fixed, there might be disputes as to what is a reasonable time, it is obvious that the mere fact that the time is fixed is not only no objection to the scheme, but removes any objection to it. There is, then, nothing wrong in the scheme so far.

Now comes clause 6, which provides for the giving of the proper notice to each member of the old company. [His Lordship read it, and continued:—] That is right enough. Unless some provision were made for telling the members of the old company what their rights were, although they might have a circular sent them, those rights might be overlooked, and therefore this provision is right. The notice tells a member

of the old company what he has a right to, and it tells him that he must assert that right within a particular time, and forwards a form to enable him to act accordingly. So far that is right.

Then comes the 7th clause, which, with the 8th, has given rise to this discussion. The 7th clause is as follows: [His Lordship read it, and continued:—]

Now, the new company is not under any obligation to accept applications under that clause for what it calls "surplus shares." That is plain from the latter part of the clause. Pausing there for a moment, supposing the new company does not accede to any of these applications, what is the result of that? The result is that it has got the shares, it has the assets of the old company, and it is master of the situation.

Next comes clause 8. [His Lordship read it, and continued:—] That is to say, all those shares of the new company which are at the disposition of the new company and are not allotted are to go to Turner, who is a nominee of the new company.

Looking at all these provisions, the substance and effect of the scheme is this: it is a scheme by which the new company takes over the assets of the old company for certain considerations in shares and so on, and one of the considerations is that the shares in the new company which are not taken up by members of the old company by a particular time shall be at the disposal of the new company. It appears to me, I confess, that that is warranted by the section of the Act which I have read. The objection to it is that this is a provision for forfeiting the shares of the members of the old company. Well, in a sense you may use that language; but, looking at the substance of the thing, it is saying to every member of the old company, "You shall have as many shares as you are entitled to in the new company if you take the trouble to ask for them within the time fixed, and if you do not you will be treated as not caring to have them." It is said that is ultra vires, but I cannot see that it is ultra vires. We have not to consider whether, if we were being asked to approve the scheme, we should approve of such a provision without

C. A. 1899 — BURDETT-COUTTS v. TRUE BLUE (HANNAN'S) GOLD MINE. — Lindley M.R.

modification. It appears to me that, so far as the authorities go, this scheme is in principle sanctioned by the decision in *Postlethwaite's Case* (1) and *Weston's Case* (2) combined. I am not aware of any case that goes quite so far as this; and that made me pause before expressing an opinion upon it; but, having looked at this scheme, it appears to me that there is nothing ultra vires about it; and, that being so, the injunction granted by the learned judge cannot be sustained.

The real truth is that the motion for this injunction has been based upon and encouraged, I do not doubt, by the query in Mr. Buckley's book on p. 428 of the 7th edition. It is a query not raised by him, but by my predecessor, Lord Esher, in the case referred to of *Nicholl* v. *Eberhardt Co.* (3), "whether an agreement"—like that here—"would be valid by which shares not applied for by the shareholders are to be at the disposal of the new company, quære." On that query this action has been hung and this motion has been made. I answer the query by saying that my predecessor was not considering a case like this, but a different case; and I cannot help thinking that he was addressing himself to the question whether he would approve the scheme or not. It is possible that, if I were addressing my mind to the same question, I might suggest some modification.

I think the appeal ought to be allowed, and the injunction must therefore be discharged.

ROMER L.J. I agree with the Master of the Rolls in thinking that this injunction should be dissolved. In the first place, if the agreement of April 24, 1899, is valid, the plaintiff has no right to an injunction at all, for the defendants are not doing anything contrary to the provisions of the agreement or outside its provisions; so that, if the agreement is valid, the plaintiff clearly has no right to come to this Court for relief. Therefore the question narrows itself down to this—Was this agreement beyond the powers of the liquidator and the shareholders? Was it outside the provisions of s. 161 of the Companies Act, 1862?

(1) 43 Ch. D. 452. (2) 62 L. T. 275; 1 Megone, 352.
(3) 61 L. T. 489; 1 Megone, 402.

Now, it is not suggested that this agreement is not a perfectly honest agreement, honestly entered into by the liquidator and the shareholders for the benefit of the company, and for the benefit of the members of the company as a whole. It is not suggested that it has been entered into from any improper motive or for any improper purpose; so that, if the agreement is within the words of s. 161, so far as I can see there is nothing to induce the Court to refuse to allow that agreement to be enforced and carried out.

Now, is the agreement within the words of s. 161? I think that when the section is looked at, it is clear that the agreement is within it, because it provides that where the business or property of a company proposed to be or in course of being wound up voluntarily is proposed to be sold to another company the liquidator may, with the sanction of the resolution mentioned in the section, enter into any arrangement whereby the selling company may, "in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefits from the purchasing company"; so that it was within the power of the liquidator, on obtaining the necessary special resolution of the company, to sell the property of the old company to the new company as he purported to do by the agreement in question here, the sole consideration being, if he thought fit, the receipt of benefits by the members of the old company—and that means by the members direct—from the purchasing company. Now, do the members of the old company in this case receive benefits from the purchasing company? They clearly do. Part of the consideration here given by the purchasing company is that each member of the old company receives a benefit from the new company. The benefit he receives is the right, if he applies within a given time, to call upon the new company to allot him shares partly paid up in the new company in lieu of or in respect of his shares in the old company. Each member of the old company has that right; an equal right is given to all the members of the old company; there is no preference between one shareholder and another, and no distinction between classes. The provision is one falling exactly within the words of s. 161.

C. A. 1899 — BURDETT-COUTTS v. TRUE BLUE (HANNAN'S) GOLD MINE. — Romer L.J.

It appears to me that under these circumstances any shareholder in the selling company who does not like the proposed scheme should attend at the meeting and vote against it. If he is outvoted and the necessary special resolution is obtained sanctioning the liquidator entering into the agreement, then his next course is to express his dissent under s. 161. It is no excuse, to my mind, for any particular shareholder to say, "I was ill, or I was abroad, or I was careless and negligent, and therefore I did not dissent within the time limited by s. 161." That is his fault or his misfortune; but he has to abide by the provisions of s. 161, and he cannot complain of the scheme, quâ scheme, merely because he, dissenting from it or not liking it, has, owing to circumstances which perhaps are not under his control, been precluded from obtaining the benefit he would have obtained under s. 161 if he had dissented within the time limited by that section. The truth is that the objection to the agreement before us is really based on this—that the scheme ought to be treated as invalid because sufficient protection is not given to shareholders in the old company who are ill or abroad, or possibly weak-minded or negligent. All one can say is that the scheme cannot be upset or be held invalid on any such consideration. Sect. 161, as I have pointed out, is peremptory in saying how dissent should be dealt with under that section; and it would be idle to suppose that a scheme otherwise good should be held bad because it might bear hardly upon certain shareholders who, owing to their fault or misfortune, were not able to send in claims as required under the scheme to enable them to reap the full benefit of the agreement.

I think the case before us has been really decided in principle by prior authorities. There is no distinction in principle between the case before us and the cases which have been cited. Such distinction as there is is merely one of degree. It appears to me that we are only following the prior cases in holding that the agreement, being intra vires of the liquidator and the shareholders, must be enforced. In my opinion, therefore, the appeal must be allowed.

[The several appeals were therefore allowed.

By consent the motion was treated as the trial of the action, and thereupon the plaintiff was ordered to pay the costs of the same and of the appeals.]

C. A. 1899 BURDETT-COUTTS v. TRUE BLUE (HANNAN'S) GOLD MINE.

Solicitors: *Kimbers & Boatman; Hays, Schmettau & Dunn; Ashurst, Morris, Crisp & Co.; Lawrence, Graham & Co.*

G. I. F. C.

In re NATIONAL BANK OF WALES, LIMITED.

C. A. 1898 WRIGHT J. *July* 26, 28, 29; *Aug.* 8, 9, 10; *Dec.* 7. 1899 *Feb.* 27. C. A. *June* 21, 22, 23, 24; *July* 10, 11, 12; *Aug.* 2.

Company—Director—Misfeasance—Payment of Dividends out of Capital—Banking Company—Losses charged against Capital—Right of Liquidator after Payment of Creditors to recover from Directors Dividends improperly paid—Damages for Misfeasance—Interest—Income Tax—Advances on Improper Security—Lien on Company's own Shares—Duty of Director—Negligence—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10—*Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

Though the paid-up capital of a limited company cannot be lawfully returned to the shareholders under the guise of dividends or otherwise, yet the law does not prohibit such a company—even if it be a banking company—from paying dividends unless its paid-up capital is intact.

The payment of dividends out of the excess of the receipts over the outgoings of a year, after making some allowance for bad debts, losses made in previous years being ignored and in effect thrown on the capital, does not amount to a payment of dividends out of capital. If paid-up capital has been lost, its subsequent application in the payment of dividends is impossible.

Excluding cases in which it would be obvious that a particular debt or outlay could not be reasonably charged to capital, the question what losses can be properly charged to capital and what to income is a matter for business men to determine, and on such a matter the opinions of honest and competent men may differ. There is no hard and fast legal rule on the subject.

But if expenses or payments are obviously improperly charged to capital simply to swell the apparent profits and to make it appear that dividends may properly be declared, dividends declared and paid under such circumstances can no more be justified than if they were paid out of capital.

A director who is acting honestly himself is entitled to trust the officers of the company not to conceal from him what they ought to report to him, if he has no reasonable ground for suspecting that they are deceiving him.

Directors are not liable for all their mistakes, but only for negligence

C. A.

1899

NATIONAL BANK OF WALES, LIMITED, *In re.*

which is in a business sense culpable or gross. Nor is a director liable for untrue representations made to the shareholders if he honestly believed the representations to be true and had at the time reasonable grounds for his belief.

The liquidator in the winding-up of a limited company can recover from the directors dividends improperly paid by them, even though the creditors of the company have been satisfied.

Turquand v. *Marshall*, (1869) L. R. 4 Ch. 376, distinguished.

A director resigned his office, and his resignation was accepted by the board. After this his name appeared as one of the directors in a report presented by the board to the shareholders. He took no part in the preparation of the report or in recommending the dividend proposed by it :—

Held, that, even if he knew that his name appeared in the report as a director, he was not liable for the statements contained in it or the recommendation of the dividend.

Clause 15 of the articles of association of a limited banking company provided that the company should have a paramount lien on all the shares held by any shareholder for all his debts to the company, and empowered the directors in case of non-payment of any such debt, or in the event of the bankruptcy of the shareholder, to sell his shares, and apply the proceeds in discharge of his debt. Clause 98 empowered the directors to lend the funds of the company, or give credit, with or without security, and provided that no advances without security should be made or credit given to any director :—

Held, that the lien given by clause 15 was a security within clause 98, and that a loan might be made to a director without any other security than the lien, if the board considered his shares to be of sufficient value.

A former director of a banking company was ordered to pay to the liquidator of the company a sum of money, together with interest thereon at 5 per cent. per annum, on the ground that he had been guilty of a misfeasance in sanctioning the payment of dividends to the shareholders out of capital :—

Held, by Wright J., that the director was not entitled under s. 40 of the Income Tax Act, 1853, to deduct income tax from the interest, it being in the nature of damages.

THE liquidator in the winding-up of this company issued a summons against John Cory, a former director of the company, asking for a declaration that he, as director, was guilty of misfeasance or breach of trust (1.) in authorizing, sanctioning, or participating in the payment to shareholders of the company of interest or dividends on their respective shares out of the capital of the company, and that he was liable and might be ordered to repay to the liquidator the amount so paid during the period in which he acted as director; (2.) in making

or sanctioning improper advances out of the funds of the company to directors of the company in contravention of the articles of association, whereby a loss accrued to the company, and that he might be ordered to pay to the liquidator the amount of that loss; (3.) in making or sanctioning improper advances to customers, and allowing overdrawn accounts and debts of customers to continue, with knowledge that those customers were, or were reputed to be, insolvent or otherwise unable to pay the amount of their indebtedness, whereby a loss had accrued to the company, and that he might be ordered to pay to the liquidator the amount of that loss.

The summons also asked that, "For the purpose of ascertaining the amount of the liability of the said John Cory in respect of the matters aforesaid, all necessary accounts and inquiries may be directed to be taken and made; and that in taking and making such accounts and inquiries the whole period during which the said John Cory acted as such director, as aforesaid, may be considered, notwithstanding that six years may have elapsed from the commencement thereof, on the ground that the losses arising from the wrongful acts aforesaid and the true state of the affairs of the said company were fraudulently concealed by the said John Cory, and that the said John Cory issued balance-sheets which were false to the knowledge of the said John Cory, and, moreover, that parts of such interest and dividends were retained by the said John Cory and converted to his own use as a shareholder of the company."

The summons was issued under s. 10 of the Companies (Winding-up) Act, 1890, on June 14, 1895.

The following statement of the facts is taken in substance from the written judgments of Lindley M.R. and Wright J.

The National Bank of Wales was a limited banking company formed in 1879. Its objects were to carry on the business of bankers, including the making of advances and the acquisition of other businesses. Its authorized capital was 2,000,000*l.*, divided into 100,000 shares of 20*l.* each. The shares were not all issued, and those which were issued were never paid up in full, 10*l.* being paid up and the remaining 10*l.* being uncalled

C. A. 1899 — NATIONAL BANK OF WALES, LIMITED, *In re.*

at the commencement of the winding-up. The number of shares issued increased from time to time. In 1884 the paid-up capital amounted to 125,000*l.*, and it so remained until 1890, when it was increased by the issue of fresh shares to 225,000*l.*

The articles of association contained the following clauses :—

15. "The company shall have a first and paramount lien available at law upon all the shares of every shareholder, whether held by him solely or jointly with any other person, for all his debts, liabilities and engagements of what nature or kind soever, either solely or jointly with any other person, to the said company, and, in case of non-payment of any such debt, liability or engagement as aforesaid for two months after written demand thereof, or in case any such shareholder becomes bankrupt, or files a petition for liquidation of his affairs, or compounds or otherwise arranges with his creditors, the board may absolutely sell (either by public auction or private contract) all the shares registered solely in such shareholder's name, and all his interests in any shares registered in his name jointly with that of any other or others, or such portion thereof as shall be sufficient to discharge or satisfy such debts, liabilities or engagements to the company, and may apply the proceeds, so far as the same will extend, in discharge or satisfaction thereof, and upon such sale the board may, without notice to or consent of such shareholder, or any other person whomsoever, transfer all or any of such shares to the purchaser thereof, and may enter such purchaser's name on the register as the holder of such shares."

78. "A director may at any time give notice in writing of his wish to resign by delivering the notice to the manager or secretary, or leaving it at the office, and on the acceptance of his resignation by a board, but not before, his office shall be vacant."

82. "Every account of the board when audited and approved by a general meeting shall be conclusive, except as regards any error discovered therein three months after the approval thereof, and where any error is discovered therein within that period the account shall forthwith be corrected and thenceforth shall be conclusive."

83. "Every director, auditor, manager, secretary and other officer, and his heirs, executors, administrators or assigns, shall be indemnified by the company from all losses and expenses incurred by them respectively in or about the discharge of their respective duties, except such as happen from their own respective wilful act or default."

86 intrusted the management of the business of the company to the board of directors.

98 B empowered the board to appoint and remove the general manager and branch or local managers.

By 98 E, "The board may lend or advance any part of the funds of the company upon the security of any bonds, debentures, mortgages or other securities, whether real or personal or otherwise, to such corporations or individuals and upon such terms as they from time to time think expedient. Provided always that no advances without security shall be made or credit given to any person who for the time being is, or who at any time within three months previous shall have been, a director."

By 98 H, "They may give credit with or without security upon cash accounts to such amount, at such rate of interest, and upon such terms as they think fit."

By 99, "No general manager shall allow an overdraft by, or give credit or make any advance to any person or firm exceeding in amount the sum of 5000*l.*, without first obtaining a resolution of the board sanctioning the same."

By 105, "The directors shall cause true accounts to be kept of all sums of money received or expended by the company, and of the matter in respect of which the receipt or expenditure takes place, and of the credits and liabilities of the company, and of all other matters necessary for shewing the true state and condition of the company."

107. "No shareholder, unless he be a director or auditor, or any officer, clerk, accountant or other person whose duty requires him to do so, shall be entitled to inspect any of the books, accounts, documents or writings of the company, except such as are produced for that purpose at a general meeting, nor shall any shareholder be entitled to a discovery thereof."

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

108. "At every ordinary meeting the directors shall lay before the meeting a balance-sheet or statement of the accounts of the company, made up to a date not more than two months before the meeting, from the time when the last preceding statement was made, or, in case of the first balance-sheet or statement, from the commencement of the company; and every such balance-sheet or statement shall be accompanied by a report of the directors as to the state and condition of the company, and as to the amount (if any) which they recommend to be paid out of the profits by way of dividend or bonus to the shareholders, and the amount (if any) which they recommend to be retained for the reserve fund; and such balance-sheet or statement shall particularise the securities on which the reserve fund is invested."

109. "The accounts of the company shall be from time to time examined, and the correctness of the statement shall be from time to time ascertained, by one or more auditors (not necessarily shareholders) to be appointed in accordance with these presents."

110 to 116 provided for the mode of appointment and the remuneration of the auditors.

By 116, "The auditors shall, at all reasonable times, have access to and inspection of the books and accounts, vouchers and registers of the company, with such assistance by clerks and others and such facilities as such auditors may reasonably require."

117. "The auditors shall be supplied, at least twenty-one days before the day for holding an ordinary meeting, with copies of the statement of accounts intended to be laid before the meeting, and it shall be their duty to examine the same, with the accounts and vouchers relating thereto, and make a report thereon, and also to examine and report on the assets of the company."

118. "If and whenever the auditors discover and apprehend any error or irregularity, whether wilful or accidental, in any of the accounts or books of accounts of the company, it shall be their duty at once to make and deliver to the board a report in writing thereon."

119. "The directors may, with the sanction of the company in general meeting, declare a dividend or bonus to be paid to the shareholders in proportion to the amount from time to time paid on their shares, and such meeting shall not have power to declare a higher dividend than the directors recommend. The directors may, out of the profits of the bank accrued in any half-year ending the 30th June, make a payment to the shareholders in anticipation of dividend (except the above half-yearly anticipated dividend) on the amount from time to time paid on their shares, and notice of the same shall be given accordingly."

120. "The directors may before recommending any dividend or bonus set aside out of the profits of the company such a sum as they think proper as a reserve or other fund, and may invest the same funds upon such Government securities, or parliamentary stocks or funds, or in such other stocks or securities as they think fit, and no dividend exceeding 6*l.* per cent. per annum shall be paid until the reserve fund amounts to at least a sum equal to one-fifth of the then paid-up capital."

121. "The board may from time to time apply such portion as they think fit of the reserve fund to meet contingencies or for equalizing dividends, or for repairing or maintaining the buildings and premises connected with the business of the company, or any part thereof, or for any other purpose of the company which they from time to time deem expedient."

The company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks, each with its own manager. The course of business was this. Each branch manager sent weekly to the head office what was called a "weekly state"—i.e., an account shewing how the assets and liabilities of the branch stood, what advances or overdrafts had been made or allowed, and to whom, what securities the bank held, and other matters. Every quarter each branch manager made a more formal return to the head office, shewing the position of the branch and the business done during the past quarter. It was the duty of the general manager to examine these documents, and to report to the board anything disclosed by them which required their

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

attention. The weekly states and quarterly returns were in the board-room for reference in case of need, but, unless attention was called to them, the directors did not think it necessary to examine them. The chairman of the directors was Thomas Cory, a brother of John Cory. The chairman and the general manager (Mr. Collins) visited each branch bank every year; and in addition two skilled inspectors frequently went round and inspected the accounts and reported to the general manager. The accounts of the branch banks appeared, however, not to have been separately audited by professional accountants. The auditors employed to examine the company's accounts, and to certify the annual balance-sheets and accounts laid before the shareholders, only saw the head office books and the returns from the branch offices, certified by their respective managers, to the head office. These certified returns formed part of the weekly states, but omitted much that they contained. The minutes of the directors' meetings shewed that, speaking generally, they attended with reasonable regularity, and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board, either by the chairman or the general manager.

John Cory became a director of the company in 1884. In November, 1890, he sent to the board a letter resigning his office. On December 18, 1890, his resignation was accepted at a meeting of the board, and on December 22 he was informed of its acceptance. But his resignation was concealed from the shareholders until after their meeting on January 21, 1891, and in the report of the directors then laid before the shareholders his name appeared as one of the directors. He, however, took no part in drawing up the report or in recommending the dividend which was declared in January, 1891, and he was not present at the meeting. After John Cory had ceased to be a director the company made large advances on insufficient security, and took over an insolvent business which greatly embarrassed it. The company, however, was not unable to pay its debts, for its large uncalled capital was amply sufficient for that purpose, and, so far as its outside liabilities were concerned, it had always been and was still quite able to discharge them in

full. Being, however, in difficulties, the company determined to amalgamate with another company and to wind up. An agreement was in February, 1893, entered into between the National Bank and the Metropolitan Bank of England and Wales for the transfer to the Metropolitan Bank of all the assets of the National Bank (except the uncalled capital), and for the payment by the Metropolitan Bank of all the debts and liabilities of the National Bank, subject, however, to this stipulation—that, if the assets transferred exceeded the liabilities, the excess should be returned to the National Bank; whilst, if the assets transferred should prove insufficient to discharge those liabilities, the deficiency should be made good by the National Bank. This agreement was made conditional upon the shareholders passing resolutions for the voluntary winding-up of the bank. Resolutions for that purpose were afterwards passed, and the agreement was approved by the shareholders and was carried out. In the result it turned out that the value of the assets and goodwill was less by about 41,000*l.* than the amount of the liabilities. The creditors of the National Bank had been paid, the Metropolitan Bank supplying the deficiency. The National Bank had to make good this deficiency, either by a call on the shares or in some other way, and the object of the summons was to provide for this deficiency. The whole of the paid-up capital of the bank had been lost. The loss was to a large extent attributable to the fact that a large number of debts due to the bank by its customers had turned out to be bad, and large sums advanced to directors and owing by them were irrecoverable. These debts had been treated in the balance-sheets as good assets, but some provision had been made for them in the sums carried to the reserve fund. Moreover, large dividends had been paid for a number of years, as if the bank had been flourishing, whilst, in truth, if its affairs had been properly conducted, these dividends ought never to have been declared.

The accounts were made up annually. Such losses incurred during the year as the directors recognised as losses were written off or provided for by carrying over to a reserve fund part of the receipts of the year, and the balance of the receipts

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

in each year over the outgoings in the same year (after making some allowance for bad debts and deductions for sums carried over to the reserve fund) were treated as the profits of that year, and were distributed as dividends. Losses written off in one year were not brought forward the next year so as to diminish the profits of that year, but were simply ignored, a fresh start being made every year and dividends being paid out of the excess of the annual receipts over the annual expenses.

Representations to the effect that due provision had been made for all bad and doubtful debts appeared in the directors' report for each year of John Cory's directorate after 1886. The accounts were certified by the auditors, their certificates stating that the accounts were properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, as shewn by the books of the company; but at the same time the auditors on several occasions wrote privately to the board to the effect that special provision ought to be made for bad debts and debts due to the bank from some of the directors, and that these matters ought to be brought to the notice of the shareholders. Nothing of this kind appeared in the auditors' certificates, and the matter was not brought to the attention of the shareholders. Though John Cory often attended the meetings he had no knowledge, according to his own account, of these letters of the auditors, and there was no evidence of his knowledge of them, except that on two occasions he was present at meetings of the board when minutes of previous meetings were read and confirmed, those minutes mentioning the receipt of letters from the auditors. He said that he trusted his brother (the chairman) and the general manager, and did not suspect that anything was wrong in the affairs of the company. But he was deceived by them. He claimed the benefit of s. 3 of the Limitation Act, 1623.

On January 19, 1888, the day before the half-yearly meeting of the shareholders of the bank, John Cory wrote to the chairman, explaining that he would not be able to be present at the meeting, and adding, "Which I regret, although all I could do at the meeting would be to congratulate the shareholders on the flourishing condition of the bank, which you will please do

for me, and say, with a little more push for *new* business by the shareholders and the continued attention of the directors to every detail of the working of the bank, I see no reason why the National Bank of Wales should not become one of the most important banking concerns in Wales."

There was evidence that advances had been made to some of the directors without any security but the lien upon their shares created by clause 15 of the articles.

The summons came on for hearing before Wright J. on July 26, 1898.

Warmington, Q.C., Sir R. T. Reid, Q.C., Ingpen, and *S. T. Evans,* for the liquidator.

Sir E. Clarke, Q.C., Swinfen Eady, Q.C., G. F. Hart, and *Nepean,* for John Cory.

Sheldon, for the Metropolitan Bank.

1898. Dec. 7. WRIGHT J., after stating the effect of the summons, continued:—I will deal first with the charge that dividends were paid out of capital. Under this head the case made by the liquidator is shortly this. By clause 108 of the articles of association the directors are to recommend dividends "out of the profits." In the annual balance-sheets debts due to the bank, which were in fact bad debts, are treated and valued as good assets; and it is suggested that at the end of each year the total of the bad debts so treated in the balance-sheet as good, or at any rate so much of them as had been "made" in that year (by which I understand advances made in the year which have turned out bad) ought to have been deducted from the amount of the profit shewn on the profit and loss account; that if this had been done it would have appeared that there was little or no profit left for dividend; and that consequently the dividends must be taken to have been paid out of capital. The whole matter is treated as a mere process of simple subtraction, no systematic distinction being made between debts which at the time were, or ought to have been, known to be bad and debts which, by reason of subsequent events, have become bad, or by reason of

C. A. 1899 NATIONAL BANK OF WALES, LIMITED. *In re.* Wright J.

subsequent information have become known to have been bad. On this, as on other points in the case, I am embarrassed by the want of expert evidence; but I am not satisfied that this view is consistent with *Lee* v. *Neuchatel Asphalte Co.* (1), or that there is any such direct relation between a balance-sheet and a profit and loss account, or between the profit and loss account of one year and the balance-sheets of other years, as this reasoning appears to assume. The one is not founded on the other. A surplus on the valuation of assets at the end of a year is not necessarily profit of the year, or profit at all. A deficiency on the balance-sheet is not necessarily loss of the year, or loss on profit and loss account, nor is the basis of valuation necessarily the same for the purposes of the two accounts. On this, as on other parts of the case, I asked in vain for expert evidence. Had it been the practice of bankers or auditors to treat the two accounts as related in the manner which is suggested, it would have been easy to prove the practice; but nothing of the kind was attempted.

But, even if the charge cannot be maintained on the particular ground on which it was principally based, there are other grounds which appear to me sufficient to establish the claim, to some extent at least. It does not require expert evidence to shew that it must be an essential part of sound banking to make in some way an adequate provision for bad or doubtful debts. If such a provision is not made, capital must be lost, and dividends paid must be regarded as paid out of capital, because there is no other fund except borrowed money from which they can be paid: *Verner* v. *General and Commercial Investment Trust.* (2)

The real question seems to me to be whether in this case it is proved that the provision made in each year for debts which either were known to be bad, or were likely to turn out to be bad, was so inadequate that it can be said that moneys were applied for dividend which ought to have been retained for the purpose of replacing advances of capital made to customers who were unable to repay them. I think that this does appear. [After referring to the evidence, the learned judge continued:—]

(1) (1889) 41 Ch. D. 1. (2) [1894] 2 Ch. 239.

It seems plain that, assuming the facts to have been known to the directors, they ought, in view of the large amount and the great and continual progressive increase of the bad and doubtful debts, to have made a provision for them out of the profits to an amount in each year representing the increase of them in that year, or preferably, as I think, representing the average or normal rate of increase, and that in paying dividends without having made such adequate provision they were pro tanto dividing money which was required for replacing capital lent to customers who could not repay it. I do not forget that in any particular year the bad debts of the trading of that year were not all then bad, or then known to be bad. Indeed, the increase of bad debts in a given year may not be wholly or even at all attributable to the trading of that year. It may be the result of insolvency overtaking persons who have received advances, or who have become sureties, in previous years. But, on the other hand, the debts supposed to be good when they were made in former years, but which would become, or become known to be, bad in that year, would require to be treated as bad in that year, although not strictly bad debts of the trading of that year, and these must, I think, be treated as bad debts of the year in which they become or were known to be bad, as otherwise they never would be treated as bad debts at all. Nor do I forget that sums amounting to 25,000*l.* were in the four years from 1887 to 1890 carried from profit to the reserve fund, in addition to large amounts derived from the issue of shares at a premium; but, on the figures as I find them, there were not any real profits out of which the 25,000*l.* could be taken, and the so-called reserve was in truth merely a partial provision for bad debts and a pro tanto absolution from the consequences of further improper payment of capital for dividend, whereas, as the auditors pointed out in their letters to the board, a real reserve fund is a fund set apart to meet contingencies after due provision made for all bad and doubtful debts, and cannot be regarded as a substitute for such a provision. Moreover, the reserve was habitually pledged for the current needs of the bank.

If these views and figures are correct, there were not in

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.* Wright J.

either of the three years, 1887 to 1889, any substantial profits properly applicable for dividend, nor in 1890 more than about 4000*l.*, even if that 4000*l.* ought not to be treated as wiped out by the great increase of insufficiently secured advances to directors in that year. No other fund is suggested, and the dividends must be regarded as having been in fact, except as to the 4000*l.*, paid out of capital.

It is next to be considered how far a knowledge of the facts which, if known to the directors, would have imposed on them a duty to make further provision such as I have mentioned for bad debts, ought to be imputed to them, and in particular to the respondent. His defence is that he knew nothing of what was going on, but trusted to the general manager and the chairman, who was his brother. How far this could be held to be a defence consistently with *Leeds Estate, Building and Investment Co.* v. *Shepherd* (1), and the authorities there cited, I need not stop to inquire; or whether such a total abnegation of the use of his faculties as he alleges would not of itself be a ground of liability. He was a paid director from November, 1883, until, at any rate, December, 1890. He was a man of business, of great local influence and position, a director of other important local companies, and his name was a mainstay of the bank's credit. He attended board meetings with considerable regularity, every fortnight in the first year, and about once a month afterwards. He held himself out as taking an active part in the management. On January 19, 1888, he wrote to the chairman, requesting him on the respondent's behalf "to congratulate the shareholders on the flourishing condition of the bank . . . . and say, with a little more push for new business by the shareholders, and the continued attention of the directors to every detail of the working of the bank, I see no reason why the National Bank of Wales should not become one of the most important banking concerns in Wales." He was a large shareholder and depositor. The customers of the bank were persons "with whom he had grown up," and many of the largest accounts were those of his relations or colleagues, or of firms in which he or they were interested. He had the general know-

(1) (1887) 36 Ch. D. 787.

ledge, to which I have already adverted, of the bank's affairs and customers. He must have known the necessity of providing for bad debts in such a business, and especially at a time when trade was in a critical state, and many of the bank's customers were in difficulties. He had before him at every board meeting accounts of such a kind that the most cursory glance at them would inform him of much of what is alleged by the complainant.

Representations to the shareholders to the effect that due provision had been made for all bad and doubtful debts appear in the directors' report for each year of the respondent's directorate after 1886; and it seems to me that, even if the entire neglect of his duties to which he confesses was not enough to make him responsible for an ultra vires payment of dividend out of capital, these representations do so to the extent, at any rate, to which the exercise of the care which he represented that he had exercised would have discovered the true state of the facts. The representations are put forward, not as a statement of the manager, but as a statement of the directors as to matters which the shareholders were by clause 107 of the articles of association precluded from investigating for themselves, and they implied that the directors had personally taken reasonable steps to ascertain that the statement was true. They made it intending it to be acted on, although they knew that they had taken no such steps, and although at the best they were ignorant whether the statement was true or false. That, as it seems to me, is fraud, or at any rate it involves the same consequences as fraud.

The case would, of course, be greatly aggravated if it were proved that, at the time of assenting to these reports, the respondent had been aware that the auditors, at the very time when they were certifying that the accounts were "properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, as shewn by the books of the company," were privately writing to the board in the strongest terms of warning and remonstrance as to the necessity of making special provision for bad debts, and bringing the matter to the notice of the shareholders. It is not, however, shewn

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.* Wright J.

that any of these letters came to the knowledge of the respondent, and I think it would be too much to impute to him an actual knowledge of them from the fact that on two occasions he was present at meetings when minutes of former meetings were read and confirmed which mentioned the receipt of letters from the auditors. I think that *Ashhurst* v. *Mason* (1) is the only case in which that has been held to be enough, and that decision can hardly be reconciled with *In re Lands Allotment Co.* (2)

In my opinion the respondent cannot claim the benefit of the Statute of Limitations in respect of the years as to which fraud such as I have mentioned is shewn. As to the last half of 1889 and as to 1890 no question arises with regard to the Statute of Limitations, this summons having been issued on June 14, 1895; but a different question arises as to the end of the year 1890. It is said by the respondent that he resigned his directorship in November, 1890, that his resignation was duly accepted by the board in the following month, and that he was no party to the report and accounts for 1890, or to the recommendation of a dividend for that year.

The facts, as I find them, are that he did send in a letter of resignation, and that it was accepted at a meeting of the directors on December 18, 1890. No doubt the resignation and the acceptance of it were fraudulently concealed until after the shareholders' meeting in January, and false minutes were made for some purpose not altogether intelligible, and, in my opinion, the respondent was a party to the concealment, though not to the making or use of the false minutes. But, except in one respect, this fraud and concealment do not affect the result. Even if the respondent had never resigned, or his resignation had not been accepted validly, or at all, the mere fact of the continuance of his directorate would not have been enough to make him responsible for what was done by the other directors without his concurrence after he had ceased to attend meetings, or otherwise act as a director, unless there were evidence of subsequent adoption by him. That con-

(1) (1875) L. R. 20 Eq. 225. (2) [1894] 1 Ch. 616.

sideration clears him of liability for everything done after November, 1890, except the presentation of the report and accounts, and the recommendation of dividend in January, 1891, for 1890. To those acts it must be taken that he was a party. His name appears as a director in that report, and I am unable to believe that he did not know that it so appeared, and he took no steps to disabuse the minds of the shareholders. The fact of the retirement of other directors is mentioned in the report, but no intimation of his retirement was given there, or at the shareholders' meeting, or at any time until July, 1891. He cannot have been ignorant that no successor to him was appointed, as would have been naturally the case upon his retirement. His adhesion to the fraudulent representation seems to me to make it a representation by him as an ostensible director for which he is liable in the same way as in respect of the previous dividends. Although he had ceased to be a director, he is liable on the ground that he allowed himself to be held out as a director. On this part of the case I have only to add that, immediately after receiving the dividend for 1890, the respondent sold nearly all his shares, retaining by a curious coincidence apparently the exact amount required for a director's qualification.

The result is that, in my judgment, the respondent must be held liable to repay the amount of dividends paid for the years 1887 to 1889, amounting to about 25,000*l.*, and 12,000*l.* out of the amount paid for 1890, or 37,000*l.* in all, besides interest, as in cases of fraud, at 5 per cent. from the dates when the dividends were paid, which I suppose will make the total sum about 50,000*l.* I have said nothing as to the year 1884, because I am not satisfied that a sufficient case has been made out on the figures with respect to that year; and in the case of the years 1885 and 1886, as to which no express representation was made in the directors' report that due provision had been made for bad and doubtful debts, I think he would be protected by the Statute of Limitations, as applied by the Trustee Act, 1888, except perhaps to the unimportant extent of the dividends which he personally received. Some similar representation is said to have been made at the shareholders'

C. A. 1899 — NATIONAL BANK OF WALES, LIMITED, *In re.* — Wright J.

meetings in those two years, but it is not shewn that the respondent was a party to the making of it.

There remains one other point for consideration on this part of the case. The creditors have been paid, and it is contended for the respondent, on the authority of *Turquand* v. *Marshall* (1) and *Flitcroft's Case* (2), that a claim in the interest of the shareholders for repayment to them of capital, which they have themselves received in the form of dividends, cannot be maintained. In *Turquand* v. *Marshall* (1), however, a bill was filed on behalf of some of the shareholders in a going company, and the expression attributed to Cotton L.J. in *Flitcroft's Case* (2), if intended to be an absolute statement of law, which I think it was not, seems opposed to the opinion of Jessel M.R. in the same case, and to the doctrine established by many cases since, that in a liquidation the liquidator has a new and independent right to recover what belonged to the company. And, even in the case of a company not in liquidation, it is difficult to see how a payment to the shareholders can be a payment to the company in a case in which the payment to the shareholders is itself a fraud on the company.

But, however this may be, the facts of the present case are such that the question does not really arise. All the assets of the bank (except the uncalled capital) have been assigned to another company, which has, out of its own funds, satisfied creditors to the amount of 41,000*l.*, and which is now the real claimant, not in the interest of the bank's shareholders (except in so far as the result may be to prevent the necessity of a further call upon them), but to recoup itself the 41,000*l.* That other company seems to me to be now subrogated to the rights of the creditors, or of the liquidator in respect of their rights. As Sir Robert Reid put it, the case is in effect the same as if the liquidator, instead of selling the assets and liabilities of the bank, had borrowed money to pay off its creditors. In such a case it could not be doubted that he could maintain these proceedings in order to recover the amount which he has had to borrow for that purpose, and the Metropolitan Bank is in the same position.

(1) L. R. 4 Ch. 376. (2) (1882) 21 Ch. D. 519.

The judgment against the respondent must, indeed, in accordance with the precedents, be expressed to be without prejudice to any right which he may have to recover from the shareholders individually the amount of capital improperly paid to them, but in the present case this expression seems to be a mere formality. In an action against a shareholder the respondent would be met (amongst other defences) by his own representation, which entitled the shareholder to receive and spend the money as income derived from profits.

The next claim to be considered is the claim for repayment of money alleged to have been improperly advanced to customers of the bank. It is contended that the respondent ought to be held responsible for the losses on several large accounts which were certainly known by him and his co-directors to be bad or doubtful, and which have turned out to be almost wholly bad, but which were continued from year to year, and even allowed to be increased without proper security. The total amount claimed to the end of 1890 in this respect is over 43,000*l*., which, however, includes about 3000*l*. advanced for the most part before the respondent was a director. All these accounts were repeatedly the subject of special reports and discussions at the board, and it cannot be said, on the one hand, that the directors, including the respondent, were not fully aware of their character, or, on the other hand, that there was any neglect to consider them. There is no specific suggestion of interest or fraud or bad motive in the respondent in relation to that. I think it would be impossible for me on these materials to hold the directors responsible. They may have acted with folly and imprudence, but they seem to have used their judgment, such as it was, and so far as I can see, honestly in this respect until the end of 1890, and I think that the observations of Jessel M.R. in *In re Forest of Dean Coal Mining Co.* (1) have great weight in a matter of this kind. He there said (2): "The customers of a trading partnership are very often allowed time, because the partners may think that, if they do not allow them time, they will drive the customers into bankruptcy and so suffer a greater loss than by

(1) (1878) 10 Ch. D. 450. (2) 10 Ch. D. 452.

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.* Wright J.

giving them time; indeed they not only very often give them time, but they lend them money or sell them goods in the hope that better times may come and enable them to pay their debts. Again, it may very often be most injurious to the trading concern to sue some of their debtors after the first few losses, because driving some of their debtors into bankruptcy might be very injurious to the trade, more so, in fact, than the chance of suffering a loss by letting them go on without taking action against them."

A different conclusion might in the present case have been proper if the respondent had been a party to the advances of money in 1891, and, even in respect of those made in the previous years, the case would have been of a different kind if all the statements made in the complainant's affidavits had been founded on evidence; but in this, as in other cases, it is necessary to distinguish the matters which are really proved from the mere inferences of fact which are drawn by the deponents, or statements which are put forward as statements of facts, but of facts not within the deponent's knowledge, and not established by the books and accounts of the bank or other admissible evidence. Lastly, this second claim is really a partial alternative to the claim for recovery of capital paid away in dividends, and the subject of it has already been allowed for under that head as part of the bad debts. The respondent ought not to be made to pay twice in respect of the same matter.

There remains the third claim in respect of advances made to directors without security. [His Lordship read clause 98 of the articles.] There is no doubt that very large advances were made to directors on insufficient security, and many of them were made on no security except the bank's lien under clause 15 of the articles on shares held by the directors. Here, again, there would have been a very strong case if the respondent had been a party to the advances made in 1891. But down to the end of 1890 I think there was no reason to doubt the solvency of F. R. Crawshay, to whom the largest sums were advanced, or that his shares were then practically a sufficient security. The liquidator assumes that as a matter of law the

lien cannot be "security" within the meaning of clause 98. I cannot take that view as a matter of law. It seems to me that "security" in that clause must include whatever a banker would ordinarily accept as security, and I have no evidence to shew that such a lien would not be so accepted, subject, of course, to considerations of amount and margin. Down to the end of 1890 F. R. Crawshay held shares of a market value considerably exceeding the total of the advances made either to him or to the firms in which he was interested, and he had deposited some other security which no doubt has turned out to be worthless, but which may at the time have appeared to be of value. Further difficulties are that the evidence does not enable me to determine how far advances made to firms or works in which F. R. Crawshay was interested can properly be treated as advances made to him personally, or what portions of the advances made to him personally in 1889 were made after June 14, 1889, so as to be excepted from the defence of the Statute of Limitations. I see no evidence of fraud in relation to him such as would exclude the operation of the statute, unless, indeed, on the true construction of clause 98 the lien could not in point of law be a security. In that view it might have been argued that a deliberate disregard of the express provision of the trust amounted to fraud, or must be treated as equivalent to fraud; but in the view which I take of that clause this question does not arise. Similar difficulties arise with regard to advances made to other directors.

1899. Feb. 27. Differences of opinion having arisen in settling the minutes of the judgment, especially with reference to the question whether, from the amount payable by the respondent, there should be deducted income tax on the interest mentioned in the judgment, the matters in difference were brought before Wright J. in court.

Ingpen, for the liquidator. If income tax can be deducted, it must be under s. 40 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), which provides for the deduction of the tax by

C. A. 1899 — NATIONAL BANK OF WALES, LIMITED, *In re.*

"every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract." The interest which has been ordered to be paid by the respondent does not come within either of those alternatives, and the deduction ought not to be allowed.

[WRIGHT J. I shall not allow the deduction unless there is some authority which binds me to do so. I consider this interest is in the nature of damages for a fraudulent breach of trust.]

G. F. Hart, for the respondent. The interest is rightly deducted, and the deduction was made on the authority of two orders, one in *In re Patent Cocoa Fibre Co.*, Bacon V.-C., 1878, B., 645, and the other in *In re J. W. Hobbs & Co.*, 00119 of 1892, Wright J., December 13, 1893. The orders are set out in Palmer's Company Precedents, 7th ed. pt. ii., Forms 631 and 635A, and in each case the order is to pay interest "less income tax."

An analogy can be obtained from the case of a purchaser in an action for specific performance. Where he is ordered to pay the vendor his purchase-money with interest, the tax is allowed to be deducted from the interest. This is yearly interest on money due "as a personal debt or obligation by virtue of a contract" within the meaning of s. 40. The respondent was held liable on the ground that he was under a contractual obligation to the company. He became a debtor to the company as from the moment at which each dividend was paid, and the debt, being by virtue of a trust, arose out of a contract. Having from that time the money in his hands, and not paying interest for it, the income on which he has paid the tax has been larger than if he had paid at once, and now, when he is ordered to pay interest, he ought to be allowed to deduct the amount of the surplus tax which he has been paying.

WRIGHT J. In *In re J. W. Hobbs & Co.* the question whether income tax could be deducted never came before me. I do not see my way to allowing Mr. Cory to deduct the

amount of income tax from the penal interest of 5 per cent. It is not a question of contract at all, so far as I can see. The matter must be regarded for this purpose as if the respondent had fraudulently given away 37,000*l.* of the capital of the company. I ordered him, rightly or wrongly, to repay that sum, and I make an order the effect of which is to find that the company has by its capital being withheld all these years suffered damages equal to 5 per cent. per annum. If the company has suffered those damages, I can see no reason why it should not get the whole of the damages back. It is called "interest," but it is really damages for withholding its capital from the company. I have tried to find some authorities on the question, but I am unable to find any.

F. E.

C. A.

Cory appealed against the order that he should pay 37,000*l.* with interest, and the liquidator gave a cross-notice of appeal as to those claims made by the summons which were dismissed.

There was no appeal on the question of deduction of income tax.

The appeals came on for hearing on June 21, 1899.

Sir E. Clarke; *Q.C.*, *Swinfen Eady*, *Q.C.*, *G. F. Hart*, and *Nepean*, for the appellant. The creditors of the National Bank have all been paid, and the liquidator now represents only the contributories. This summons was issued in their interest in order that they might escape having to pay further calls to make good to the Metropolitan Bank the deficiency in the assets of the National Bank. On behalf of the contributories the claim of the liquidator cannot be maintained, for it is they who have received the dividends which are said to have been paid out of capital. They cannot compel the directors to pay over again the money which they have themselves received, whether it was or was not wrongly paid to them: *Turquand* v. *Marshall* (1), which exactly applies to the present case. Moreover, another difficulty would be that the present shareholders may not be the same persons as those who received the dividends in question.

(1) L. R. 4 Ch. 376.

C. A. 1899 — NATIONAL BANK OF WALES, LIMITED, *In re*.

[ROMER L.J. Is the liquidator bound to make a call before he sues Cory?]

The uncalled capital is an asset of which he must avail himself before he can bring an action on behalf of the shareholders. The Metropolitan Bank do not stand in the shoes of the creditors; the agreement between them and the National Bank provides what is to be done in case the assets of the latter are not sufficient to discharge their liabilities—a call is to be made on the shareholders to meet the deficiency. But the shareholders cannot recover capital which has already been paid to them, even though it has been improperly paid.

[LINDLEY M.R. In *Turquand* v. *Marshall* (1) the company was not incorporated. The same reasoning will not technically apply to a corporation. Is it any answer to the claim of the company to say the money was paid to the shareholders?]

That is a mere technicality when there are no creditors. Whatever the liquidator recovers from the directors he will have to distribute among the shareholders, so that in substance they will be paid twice over. *Flitcroft's Case* (2) will probably be relied upon for the liquidator. But in that case Cotton L.J. said (3): "If the corporation were suing for the purpose of paying over again to the shareholders what the shareholders had already received, the Court would not allow it. But that is not the case here, the company is insolvent, and there is no objection to allowing it to get back its funds for the purpose of paying debts." The director, if compelled to pay, would be entitled to recover back what he paid from the shareholders: *Moxham* v. *Grant* (4); *In re National Funds Assurance Co.* (5)

[LINDLEY M.R. But here the National Bank are not suing for the benefit of the shareholders; they are suing for the benefit of the assignees of their assets.]

In substance they are asking that Mr. Cory should pay instead of the shareholders, who must otherwise pay. The right to make calls was not an asset which was sold to the Metropolitan Bank, nor was such a claim as this against a

(1) L. R. 4 Ch. 376.
(2) 21 Ch. D. 519.
(3) 21 Ch. D. 536.
(4) [1899] 1 Q. B. 480.
(5) (1878) 10 Ch. D. 118, 126.

director part of the assets which were sold to the Metropolitan Bank.

Upon the evidence it is by no means clear that dividends have in fact been paid out of capital, and at any rate an inquiry should be directed on this point. It is not enough to shew that a debt due to the bank has become a bad debt; the question is whether the directors were guilty of a misfeasance in not recognising in a particular year that a debt then due was bad. They may have made at that time a reasonable provision for bad debts, and this provision may have turned out afterwards to have been insufficient.

It has been decided that dividends may properly be paid to the shareholders of a company, notwithstanding that there has been a loss of capital. There is no obligation under the Companies Acts to make good out of the profits of one year a loss of capital occurring in previous years: *Lee* v. *Neuchatel Asphalte Co.* (1); *Wilmer* v. *McNamara & Co.* (2); *Verner* v. *General and Commercial Investment Trust.* (3)

[ROMER L.J. Debts due to a bank from their customers must in some way or another be brought into the profit and loss account.]

There has been no misfeasance on the part of the appellant, and, if he is liable at all, he is not properly liable for so large a sum as Wright J. has ordered him to pay. By virtue of s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), the appellant is entitled to the benefit of the Statute of Limitations. This will cover all the payments of dividend made before June 14, 1889. This section applies to directors of a company, they being trustees as to moneys of the company which have come to their hands or are under their control: *In re Lands Allotment Co.* (4); *In re Kingston Cotton Mill Co.* (*No.* 2). (5) The claim is not alleged to be founded upon any fraud or fraudulent breach of trust to which the appellant was party or privy. It was said on behalf of the liquidator that there was concealment in the statement of the directors that they

(1) 41 Ch. D. 1.
(2) [1895] 2 Ch. 245.
(3) [1894] 2 Ch. 239.
(4) [1894] 1 Ch. 616.
(5) [1896] 1 Ch. 331, 347.

C.A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

had made provision for bad and doubtful debts, and that this involved the same consequences as an actual fraud. But by clause 84 of the articles of association the directors are not liable unless they have been guilty of wilful default.

The payment of dividends out of capital is not per se a fraud. It may be a breach of trust, but it is not necessarily fraudulent. To constitute wilful default there must be something more than negligence—there must be an intentional omission. In order that there may be wilful default the man must be a free agent—must know what he is doing and intend to do it: *In re Young and Harston's Contract* (1), per Bowen L.J. (2)

The appellant cannot properly be made responsible for any dividend which was declared after his resignation of the office of director in November, 1890, and he ought to be credited with the profits made in 1890.

[ROMER L.J. If a man allows it to be represented to the shareholders that he is a director, can he escape liability as such? If he allows it to go forth to the shareholders that he as director has stated that the company has earned a profit, can he stand in any better position than if he had actually made that statement: *Pickard* v. *Sears*? (3)]

The responsibility of a director arises from his having improperly dealt with the funds of the company, not from any statement which he has made. It would be a novel doctrine to say that there can be a liability for fraud by estoppel. If the director was not present when the wrongful act was done, that is a sufficient answer on his part. Can a director be held liable merely because he said or allowed it to be said that he took part in a wrongful act, when in fact he did not? It must be shewn that he was a director, and that while he held that office he concurred in the declaration and payment of a dividend which had not been earned. It is essential that he should have actually taken part in the wrongful act: *In re Denham & Co.* (4) The effect of the decision of Wright J. is to make the appellant responsible, though he was not a director, for that for which he would not have been responsible if he

(1) (1885) 31 Ch. D. 168.
(2) Ibid. 175.
(3) (1837) 6 Ad. & E. 469.
(4) (1883) 25 Ch. D. 752.

had been a director, because he was not present at the meeting in January, 1891.

Upon the evidence the learned judge was wrong in finding that there was any breach of duty by the appellant, or that dividends were in fact paid out of capital. The accounts having been audited by competent officers the directors were entitled to rely upon them, and are not liable, even if it afterwards turned out that dividends had been paid out of capital: *Rance's Case* (1); *In re Denham & Co.* (2) And, inasmuch as the dividends were paid with the assent of the shareholders, the directors cannot be personally liable for the payments, even if they were wrongfully made.

It was not wrong to bring the premiums received on the issue of new shares into the profit and loss account as profit. There is no obligation to make good lost capital before dividing the profit earned in a year.

[ROMER L.J. I agree that when a company has made a profit in one year they may be entitled to divide it as profit, without regard to capital lost in a previous year. There is no hard and fast rule that you cannot divide profits until capital lost in a previous year has been made good. But premiums on the issue of shares are not ordinary trading profits; they are rather of the nature of an increase of capital.]

It is submitted that, even if the whole of the nominal capital had been lost, premiums received upon the issue of new shares could be divided as profits: *Verner* v. *General and Commercial Investment Trust.* (3) There is no obligation to keep up the value of a company's capital to its nominal amount, and there is no middle course.

[LINDLEY M.R. referred to *Stringer's Case.* (4)]

No doubt it is settled by *Trevor* v. *Whitworth* (5) that no part of the fund which has been subscribed as capital can be returned to the shareholders. But that does not prevent the payment of a dividend out of the profits of a particular year: *Dent* v. *London Tramways Co.* (6)

(1) (1870) L. R. 6 Ch. 104.
(2) 25 Ch. D. 752.
(3) [1894] 2 Ch. 239.
(4) (1869) L. R. 4 Ch. 475.
(5) (1887) 12 App. Cas. 409.
(6) (1880) 16 Ch. D. 344.

C. A.
1899
NATIONAL BANK OF WALES, LIMITED, *In re.*

[ROMER L.J. referred to *Lubbock* v. *British Bank of South America*. (1) It is not easy to distinguish between the issue of new shares and the sale of a part of the capital assets.]

A depreciation of goodwill during a year need not be brought into account in ascertaining profit for the year: *Wilmer* v. *McNamara & Co.* (2) But in truth the 25,000*l.* received for premiums was not divided as profit: it was carried to the reserve fund. On a true view of the accounts no dividend was paid out of capital. The complaint against the directors resolves itself into this—that they did not make sufficient provision for bad and doubtful debts. But they made an honest estimate. They may have been mistaken, but they were not guilty of any misfeasance or breach of trust.

At any rate the appellant ought not to be charged with interest on the sum which he has been ordered to pay, except as to the dividends paid to himself, for with that exception he did not retain the money to his own use; it was paid away to other persons. But in principle there is no difference between dividends received by a director himself and dividends paid to other shareholders: *In re Denham & Co.* (3) Moreover, the claim against the appellant is in substance made by the Metropolitan Bank, and they can only be entitled to interest (if at all) from the date at which it was ascertained that the assets of the National Bank were insufficient to meet their liabilities.

Warmington, Q.C., *Buckley, Q.C.*, *Ingpen*, and *S. T. Evans*, for the liquidator. On the materials before him the learned judge has ordered the appellant to pay to the liquidator the minimum amount which according to the evidence was due from him. The appellant was a man of great business experience and reputation and was a director of the bank. A course of procedure had been laid down by the directors for their own guidance, and if that course had been followed the bank would never have been brought into this disastrous position. From the documents placed before the board, without searching into the books of the bank, the appellant might have known that many of the items which were included in the balance-sheets as assets had

(1) [1892] 2 Ch. 198. (2) [1895] 2 Ch. 245.
(3) 25 Ch. D. 752.

not at the time any real existence. He had only to look at the "weekly states" from the branches to see that there were many suspicious items, and it was his especial duty to inquire into those items. The rules laid down by various minutes of the board were not carried out in practice. Debts due to the bank from debtors who had become bankrupt were retained in the books as of their full nominal amount, and this was done even after the directors had been informed of and had recognised the bankruptcies, and had resolved to accept a composition in respect of the debts. Debts undoubtedly bad were carried forward as good assets, without any reserve being made against them. How can a director be heard to say that he did not know what was being done? The same observations apply to the "dormant accounts" and to the "improper advances." Advances were made at a time when there was no chance of the bank's being repaid. Even statute-barred debts were included among the assets. And yet the reports made to the shareholders stated that sufficient provision had been made for all bad and doubtful debts. In the case of a bank, a loss made, say in 1888, ought to have been brought into account against a profit made in 1889. Till that had been done the profits of 1889 could not properly be divided among the shareholders.

It is not an answer to the liquidator's claim to say that the money when recovered will go in relief of the shareholders because it will increase the assets of the bank. Such a defence goes too far. The shareholders may not be the same persons now as when the improper payments were made. In such cases the Court has always given relief without prejudice to any right of indemnity which the directors may have against any of the shareholders. But, even if the body of shareholders who received the money was composed of identically the same persons as those for whose relief it would be repaid, still the company being incorporated is a distinct legal entity—the creature of the Companies Act—and has rights independent of those of the shareholders who compose it: *Salomon* v. *Salomon & Co.* (1); *Welton* v. *Saffery*. (2) This distinguishes the present case from *Turquand* v. *Marshall*. (3) There cannot be a waiver

(1) [1897] A. C. 22. (2) [1897] A. C. 299. (3) L. R. 4 Ch. 376.

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

of a right without knowledge of the facts. It is the duty of the liquidator to get in all the assets of the company, and money of the company which has been improperly paid away as dividend still remains part of the company's assets. It is a different question how the liquidator is to apply the money when he has got it.

The Court is not dealing with a company formed for working a tramway, or a patent or a colliery, but with a company operating with a circulating capital. In *Verner* v. *General and Commercial Investment Trust* (1), Lindley L.J., in stating (2) that "there is no law which compels limited companies in all cases to recoup losses shewn by the capital account out of the receipts shewn in the profit and loss account," adds this important qualification: "although care must be taken not to treat capital as if it were profit. This is in accordance with *Bolton* v. *Natal Land and Colonization Co.*" (3) That qualification applies here, for the facts have not been truly stated in the profit and loss accounts. A bank should carry forward a debt just as a credit is carried forward: it could not exist on the principle contended for on behalf of the appellant.

[LINDLEY M.R. Is it illegal? Suppose capital is lost in 1880: it is lost, and there is an end of it.]

It is illegal on these articles. You cannot pay dividends except out of profits: if there is no profit there can be no dividend. There is a wide distinction between fixed capital and circulating capital. Payment of dividends out of capital is ultra vires in the strict sense of the words. It is contrary to the constitution of the company. But if the directors, without negligence, honestly exercising their judgment, think there was a profit and pay a dividend, they are not liable for so doing if it turns out there was no profit: *Stringer's Case.* (4) The onus is on them to shew that there was a profit, or that they formed an honest opinion. Making improper advances is not ultra vires at all—it is negligence. A director is to apply commercial prudence; he may take a proper risk and make a profit by taking that risk; but negligence exists when the

(1) [1894] 2 Ch. 239.
(2) Ibid. 267.
(3) [1892] 2 Ch. 124.
(4) L. R. 4 Ch. 475.

director has failed to bring to his conduct of the company's affairs proper care and diligence, and has thus broken his contract with the company. Advances to directors may be partly ultra vires and partly negligent. For (*a*) if the board, in face of the articles, make advances to a director without security, it is ultra vires; they are acting contrary to their instruction; (*b*) the advances may be made by negligence, as in the case of other improper advances. The right of a company or its liquidator to take proceedings for the recovery of its assets which have been lost or improperly applied is clear, and it is immaterial that the defendant will be entitled to share in the distribution of the assets when recovered: *New Sombrero Phosphate Co.* v. *Erlanger* (1); *Phosphate Sewage Co.* v. *Hartmont.* (2) In *Moxham* v. *Grant* (3) the only question was whether directors were entitled to an indemnity over against the shareholders. It is no authority for the appellant; neither is *Flitcroft's Case* (4) when properly understood. There Cotton L.J. points out (5) that directors may be sued for money improperly paid to the shareholders. It is said that if the company makes a loss one year and a profit the next, the profit may be divided irrespective of the loss of the previous year; but in commercial transactions you cannot make a profit unless you have provided for your losses: that is true from month to month; and, if so, why not from year to year? Accounts are rendered yearly to shew the financial position of the concern. A trader cannot say at the end of any year, "I will disregard the loss of capital, and will only regard my future profits." There is no ground for taking different periods for ascertaining profits and losses. Take the analogy of preference capital carrying a fixed dividend: there the deficiency of dividend paid out of profits in one year may be made good out of the profits of any subsequent year: *Henry* v. *Great Northern Ry. Co.* (6); *Webb* v. *Earle.* (7) Thus you carry your debit on the profit and loss for one year forward to the

(1) (1877) 5 Ch. D. 73, 113–4.
(2) (1877) 5 Ch. D. 394, 441.
(3) [1899] 1 Q. B. 480.
(4) 21 Ch. D. 519.
(5) Ibid. 536.
(6) (1857) 1 De G. & J. 606, 643.
(7) (1875) L. R. 20 Eq. 556, 560.

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

next year. In a banking company of this kind the capital must be kept up to its nominal amount, and any application of it to the contrary is ultra vires; but in a trading company when capital is sunk once for all in the purchase of wasting property, such as stocks and shares or mills and machinery, a depreciation in the capital caused by trading with it need not be made up: *Lee* v. *Neuchatel Asphalte Co.* (1); *Verner* v. *General and Commercial Investment Trust* (2); *Wilmer* v. *McNamara & Co.* (3); *In re Kingston Cotton Mill Co.* (*No.* 2). (4) Now, the business of a bank is dealing in money, to attract custom, and to create debts. A customer is allowed to create a debt by having an overdraft, not for ever, but in order to pay interest. Circulating capital of this kind must be made good before dividends are paid: *In re National Funds Assurance Co.* (5) The two cases, *Dent* v. *London Tramways Co.* (6) and *Davison* v. *Gillies* (7), in one of which it was held that profits could not be ascertained without reinstating capital, and in the other that profits could be ascertained without doing so, are no doubt difficult to reconcile, except on the ground that in the case of preference shareholders there was to be a sinking fund, but in the case of ordinary shareholders there was not. If a line can be drawn at any year, what is the object of applying to the Court to sanction the writing off a loss of capital under the Companies Act, 1877, which was passed to rectify the previous want of jurisdiction, as is shewn in *In re Ebbw Vale Steel, Iron and Coal Co.*? (8) The distinction between fixed capital, on which a dividend can be paid notwithstanding a loss of capital, and floating or circulating capital, on which a dividend cannot be paid so long as there is a deficit in the capital, is shewn in *Verner* v. *General and Commercial Investment Trust.* (9) *Lubbock* v. *British Bank of South America* (10), a case of a banking company, is the converse of the present case, for there the assets had appreciated; the company wished to divide the

(1) 41 Ch. D. 1.
(2) [1894] 2 Ch. 239.
(3) [1895] 2 Ch. 245.
(4) [1896] 1 Ch. 331.
(5) 10 Ch. D. 118, 127.
(6) 16 Ch. D. 344.
(7) (1879) 16 Ch. D. 347, n.
(8) (1877) 4 Ch. D. 827.
(9) [1894] 2 Ch. 239, 245-6, 266.
(10) [1892] 2 Ch. 198.

surplus assets as profit; and it was held that their obligation was to keep up the amount of the paid-up nominal capital, not more. That case also explains the principles on which the accounts of a trading company should be kept. On principle, then, fixed capital need not be kept up, but floating or circulating capital, such as the capital of a banking company, must, and what has been lost in any year must be made good before you can arrive at a profit in a subsequent year available for dividend.

What, then, is the obligation of directors in declaring what in fact the profits are? If it is shewn that they took no proper care to ascertain whether there were profits, the onus is on them to shew that in paying a dividend they paid it out of profits, and for that purpose prepared a proper profit and loss account: *Rance's Case.* (1) Here we shew that the balance-sheets are utterly wrong, and that the amount paid in dividends ought never to have been so paid. The auditors, whose duty it was to form an opinion and report upon the financial position of the company, had not, as regards the branches, sufficient information laid before them, and the directors cannot, therefore, rely upon the auditors' certificates as protecting them. It was the duty of the directors to inform the auditors of the state of the debts due to the bank, which they themselves knew from the weekly statements, and this duty was not performed. It was the duty of the directors to put the auditors in a position to report upon the assets of the bank in compliance with clause 117 of the articles of association, and this was not done. Upon the materials which the directors had before them they ought to have formed an honest judgment whether the debts were or were not worthless, and they did not. If a man does a dishonest act with knowledge of all the facts, he cannot defend himself by saying, "I did not intend to act dishonestly": *In re National Funds Assurance Co.* (2); *In re Oxford Benefit Building and Investment Society* (3); *Leeds Estate, Building and Investment Co.* v. *Shepherd* (4); *In re Sharpe.* (5) If a

(1) L. R. 6 Ch. 104, 117, 122–3.
(2) 10 Ch. D. 118, 128.
(3) (1886) 35 Ch. D. 502, 512.
(4) 36 Ch. D. 787, 805.
(5) [1892] 1 Ch. 154, 165.

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

director allows debts due from bankrupt debtors to be put down as worth 20s. in the pound, he cannot be heard to say he did not know this was wrong. Ratification by all the shareholders is not as against the company a valid defence for a director who has done an act which is ultra vires the company: *Flitcroft's Case.* (1) The negligence for which a director is liable is that which would render him liable in an action: *Marzetti's Case.* (2) A director when he accepts the office contracts that he will act honestly, and that he will bring to the discharge of his duties a reasonable amount of care, diligence, and knowledge. Here the directors, knowing the state of the "dormant accounts," should have required further information from the branch managers. They should not have treated those debts as worth their full nominal value. They should have made a proper estimate of their value. In fact, they made no inquiry at all. Sect. 8 of the Trustee Act, 1888, does not apply to an act which is ultra vires the company. In *In re Lands Allotment Co.* (3) the acts complained of were ultra vires the directors. The doing by an agent of an act which the principal himself could not do is not a breach of trust. If the principal could not do the act, the agent when he did it must have done it on his own behalf, not on behalf of the principal.

[ROMER L.J. The director must be treated either as an agent or a stranger. If he was a stranger, the ordinary Statutes of Limitations apply to him.]

If, however, there was a breach of trust, it was fraudulent. An untrue statement as to the truth or falsity of which the man who makes it has no belief is fraudulent: *Smith* v. *Chadwick* (4); *Derry* v. *Peek.* (5) The appellant had no honest belief that due provision had been made for bad and doubtful debts, and yet he took upon himself to assert that it had. The payment of the dividend was a result of the fraudulent statement on which the board recommended the payment of a dividend. The dividend would not have been declared and paid unless the directors had said that due provision had been

(1) 21 Ch. D. 519, 533, 534.
(2) (1880) 28 W. R. 541, 543.
(3) [1894] 1 Ch. 616.
(4) (1884) 9 App. Cas. 187, 203.
(5) (1889) 14 App. Cas. 337.

made for bad and doubtful debts. This amounts to a fraudulent breach of trust.

As regards the cross-appeal, the evidence shews that "improper advances" were made to customers—namely, advances were made without any reasonable care. There was gross negligence on the part of the directors.

Again, advances were made to directors without any security beyond the lien which the company had under clause 15 of the articles upon their shares, though art. 98*e* clearly requires a "security," in the case of an advance to a director—that is, a definite security—something different from the "lien" under art. 15. Giving credit to a director by an overdraft is prohibited: if he wants an advance, he may have it on his giving "security." The articles thus make a clear distinction between a debt due from an ordinary shareholder, for which a "lien" is given on his shares, and an advance to a director for which he is to give "security."

An advance to a firm of which a director was a member would stand in the same position as an advance to a director.

The appellant has not discharged the onus of shewing that his letter of resignation relieved him from responsibility.

Sir E. Clarke, Q.C., in reply.

[LINDLEY M.R. We are satisfied that s. 8 of the Trustee Act, 1888, applies, though not, of course, to dividends which the appellant himself received. We are satisfied, also, that the appellant retired from the office of director, and that he is not responsible for the balance-sheet which was published after his retirement. That reduces his liability to the period between June 14, 1889, and the date of the acceptance of his resignation.]

The lien given by clause 15 upon a director's shares is a "security" for an advance to him within the meaning of clause 98*e*: *Everitt* v. *Automatic Weighing Machine Co.* (1) It is not disputed that down to 1890 the shares of the bank were of their par value, and under those circumstances the shares were as much a "security" as the shares of any other company which were at par would have been.

The onus is on the liquidator to shew that dividends were

(1) [1892] 3 Ch. 506.

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

paid out of capital, and he has not done so. In *Rance's Case* (1) the directors had paid dividends without taking the least pains to ascertain whether any profits had been made. That was not so in the present case.

There is no evidence of any such negligence on the part of the appellant as will render him liable for a misfeasance.

Cur. adv. vult.

1899. Aug. 2. LINDLEY M.R. read the judgment of the Court (Lindley M.R., Sir F. H. Jeune, and Romer L.J.), which (after stating the effect of the order of Wright J. and of the liquidator's cross-notice) continued:—

The appeal and the cross-appeal require the Court to examine into Mr. John Cory's conduct as a director of the company from the time when he became a director in 1884 until he ceased to be so in December, 1890, or even later, if the liquidator is correct.

The order under review was made on a summons issued under s. 10 of the Companies (Winding-up) Act, 1890, on June 14, 1895, a date which is material, having regard to the Statute of Limitations, on which Mr. Cory relies as a defence to the greater part of the demands made against him.

It will be convenient to consider his appeal first. This raises the question whether the funds of the company have been misapplied in payment of dividends, and, if they have, whether Mr. John Cory is liable for the misapplication. Before examining the controverted facts and discussing the legal questions which arise, it is desirable to state shortly the history of the company, and how the present controversy has arisen. [His Lordship then stated the objects of the company, its capital, and the provisions of the articles of association as above mentioned, and the general course of the business of the company, and continued:—]

The minutes of the directors' meetings shew that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the

(1) L. R. 6 Ch. 104.

board either by the chairman or by the general manager. Mr. John Cory has stated in his affidavit the general course of business at board meetings, and his cross-examination does not substantially differ from the account he there gives.

Wright J. has regarded this evidence as an admission by Mr. John Cory of a total abnegation of the use of his faculties, and of an entire neglect of his duties. We cannot go so far as this. His evidence does, however, shew that he only attended, when present, to whatever his attention was called to; and that, having no suspicion that anything was wrong, he made no special inquiries in order to ascertain that all was right.

After Mr. John Cory had ceased to be a director, the company made large advances on insufficient security, and took over an insolvent business which greatly embarrassed it. The company, however, was not unable to pay its debts, for its large uncalled capital was amply sufficient for that purpose, and, so far as its outside liabilities are concerned, it always has been and is quite able to discharge them in full.

Being, however, in difficulties, the National Bank of Wales determined to amalgamate with another company and to wind up. An agreement was entered into between the National Bank and the Metropolitan Bank of England and Wales for the transfer to the Metropolitan Bank of all the assets of the National Bank (except the uncalled capital), and for the payment by the Metropolitan Bank of all the debts and liabilities of the National Bank, subject, however, to this stipulation, namely, that if the assets transferred exceeded the liabilities the excess should be returned to the National Bank, whilst if the assets transferred should prove insufficient to discharge those liabilities the deficiency should be made good by the National Bank.

There is a deficiency of about 41,000*l.* which the National Bank has to make good. The sum can be raised easily enough by a call on the shareholders; but they naturally object to this if money can be got in from other quarters, which will relieve them from the necessity of paying a call.

The investigation into the affairs of the National Bank which has been made in order to carry out the amalgamation

C. A. 1899

NATIONAL BANK OF WALES, LIMITED, *In re.*

with the Metropolitan Bank has revealed a very unsatisfactory state of things. The whole of the paid-up capital has been lost, and some 41,000*l.* has to be raised to clear the bank from debt. The cause of loss is to a great extent attributable to the fact that a large number of debts due to the bank by its customers have turned out to be bad; and large sums advanced to directors and owing by them are irrecoverable. Moreover, large dividends have been paid for a number of years as if the bank was flourishing, whilst in truth, if its affairs had been properly conducted, the large dividends declared and paid ought never to have been recommended by the directors.

There can be no doubt that the shareholders were grievously deceived by the reports and balance-sheets laid before them, and no one can be surprised at their anger with their directors, and especially with the chairman and general manager, both of whom have been criminally prosecuted and convicted for their fraudulent conduct. Mr. John Cory's answer, however, to the attempt to make him liable for the losses sustained, and dividends paid, whilst he was a director, is that he was himself as much deceived as the shareholders by the chairman and manager, and that he was not guilty of any breach of his duty in not making special investigation when he had no reason to suppose that anything was wrong.

Wright J. has come to the conclusion that Mr. John Cory was not only negligent but fraudulent; or, at all events, guilty of misconduct equivalent to fraud as regards its legal consequences. The learned judge has arrived at this conclusion from the fact that in their reports the directors unjustifiably stated that they had made provision for bad and doubtful debts, whereas they had not. That the chairman and Collins, the manager, knew this is very likely true, but whether Mr. John Cory knew it is quite another matter. The table of bad debts shews that sums were constantly written off for bad debts, and there is nothing to justify the inference that Mr. John Cory knew that those sums were insufficient or that he did not honestly believe them to be sufficient. It may be that he ought to have been more vigilant than he was, and that he should not have trusted his brother and Collins as much as

he did. But negligence is one thing; fraud is another; and we are quite unable to adopt the view of Wright J.—that Mr. John Cory acted fraudulently in making reports to the shareholders and laying the balance-sheets before them.

At the close of the argument for the liquidator we intimated that, in our opinion, the charge of fraud against Mr. John Cory failed, and further study of the evidence has strengthened this conviction. This is not only a very important matter to him as regards character, but to a great extent it relieves him from responsibility for anything done or omitted before June 14, 1889.

Another part of the case on which we are unable to agree with Wright J. relates to the date of Mr. John Cory's retirement from the board. There can be no doubt that he sent in a letter of resignation (although it was not produced) and that his resignation was accepted at a meeting of the directors, held in London on December 18, 1890, and that he was informed of its acceptance on December 22, 1890. There can also be no doubt that his resignation was concealed from the shareholders until after their meeting on January 21, 1891, and that in the report then laid before the shareholders the name of Mr. John Cory appeared as a director. The evidence is conflicting upon the question whether his resignation was or was not mentioned at the meeting. On the other hand, he was not present at the meeting; and he swears he did not know that his name still appeared as a director. The learned judge says he is unable to believe that he did not know that his name so appeared, and in the view of the Court below he improperly allowed his retirement to be concealed, and allowed himself to be held out as a continuing director, and as concurring in the report of January, 1891, which the learned judge holds to be as fraudulent on Mr. John Cory's part as those reports which preceded it. We cannot adopt the learned judge's view of this part of the case. We are satisfied that Mr. John Cory's resignation was bonâ fide—a fact, and not a sham. He was not in fact a director after his resignation was accepted. He took no part in drawing up the report, nor in recommending the dividend declared in January, 1891.

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

Even if he received the report before the meeting, and saw his name in it as a director, and did not insist that his name should be struck out, or that his resignation should be mentioned to the meeting (and the case against him cannot be put more strongly than this), even then we fail to see how such knowledge and omission can, without more, make him liable for misapplying the funds of the company, when in truth he took no part in their misapplication.

With these preliminary observations we pass to consider Mr. John Cory's liability in respect of the dividends declared in July, 1889, December, 1889, and July, 1890. The liquidator has taken the view that the dividends declared and paid by the company, when Mr. John Cory was a director, were all paid out of the capital of the company; and the evidence adduced is directed to prove that such was the case. But when this evidence is examined, it seems quite plain that the dividends were not in fact paid out of any part of the money forming the paid-up nominal capital of the company, but were paid notwithstanding the loss of such capital, and without making it good. What was done was this: the accounts were made up annually. Such losses incurred during the year as the directors recognised as losses were written off or provided for by carrying sums of money over to a reserve fund, and the balance of the receipts in each year over the outgoings in the same year, after making some allowance for bad debts and deductions for sums carried over to the reserve fund, were treated as the profits of that year, and were distributed as dividends. Losses written off in one year were not brought forward the next year, so as to diminish the profits of that year, but were simply ignored, a fresh start being made every year, and dividends being paid out of the excess of the annual receipts over the annual expenses. The effect of this was to throw all bad debts, written off and not provided for by an increase of the reserve fund, on to the capital; to diminish the paid-up capital year by year, and nevertheless to keep paying dividends out of the excess of the annual receipts over the current expenses. It is obvious that this method of procedure, if long continued, would ultimately exhaust the paid-up capital

of the company, and the first disastrous year in which the current outgoings exceeded the current incomings would produce great embarrassment. Such a mode of dealing with the company's assets, however reprehensible, must nevertheless not be confounded with paying dividends out of the paid-up capital of the company. The paid-up capital of a limited company cannot be lawfully returned to the shareholders under the guise of dividends or otherwise. Even an article of association authorizing the payment of interest to shareholders on the amounts paid upon their shares cannot authorize a payment of such interest out of capital: see *In re Sharpe* (1); but paid-up capital which is lost can no more be applied in paying dividends than in paying debts. Its loss renders any subsequent application of it impossible. There was no such dealing with the paid-up capital of the company in this case as to amount to an illegal application of it. Further, it is not possible for the Court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid-up capital is intact. Suppose a heavy unexpected loss is sustained, which must be met if there are assets with which to meet it. The capital, even uncalled capital, must, if necessary, be applied to meet it. Such an application of capital is a perfectly legitimate use of it. There is no law which in the case supposed prevents the payment of all future dividends until all the capital so expended is made good. Many honest and prudent men of business would replace a large loss of capital by degrees, and would reduce the dividends, but not stop them entirely, until the whole loss was made good. No law compels them to pay none at all. There are cases in which no honest competent man of business would think of charging particular debts or expenses to capital.

We are certainly not prepared to sanction the notion that all debts incurred in carrying on a business can be properly permanently charged to capital, and that the excess of receipts over other outgoings can be afterwards properly divided as profit as if there had been no previous loss. No honest competent man engaged in trade or commerce would carry on

(1) [1892] 1 Ch. 154.

C. A. 1899 — NATIONAL BANK OF WALES, LIMITED, *In re.*

business on such a principle. But, excluding cases in which every one can see that a particular debt or outlay cannot be reasonably charged to capital, it may be safely said that what losses can be properly charged to capital, and what to income, is a matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ: see *Gregory* v. *Patchett*. (1) There is no hard and fast legal rule on the subject.

There can, however, be no doubt that, if expenses or payments are obviously improperly charged to capital, and are so charged simply to swell the apparent profits, and to make it appear that dividends may properly be declared, dividends declared and paid under such circumstances cannot be treated as legitimately paid out of profits, and can no more be justified than if they were paid out of capital. This was determined in *Bloxam* v. *Metropolitan Ry. Co.* (2), and has been acted upon in many other cases, e.g., *Rance's Case* (3); *In re Oxford Benefit Building and Investment Society* (4); *Leeds Estate, Building and Investment Co.* v. *Shepherd* (5); *In re London and General Bank (No. 2)*. (6)

It would seem that Jessel M.R. inclined to the opinion that a limited company could not pay dividends unless its paid-up capital was kept up: see *In re Ebbw Vale Steel, Iron and Coal Co.* (7) But no decision has yet gone this length, and it has since been decided that dividends may be paid, even by a limited company, although its nominal capital is not kept up: see *Verner* v. *General and Commercial Investment Trust* (8) and *Lee* v. *Neuchatel Asphalte Co.* (9) What was lost there was fixed capital, and it is obvious that circulating capital, or any other money employed in earning returns, must be deducted from them in order to ascertain how much of them can be regarded as profit. If the returns do not exceed the money spent in procuring them (whether such money be called circulating capital or by any other name) there can be no profits; and

(1) (1864) 33 Beav. 595.
(2) (1868) L. R. 3 Ch. 337, 350.
(3) L. R. 6 Ch. 104.
(4) 35 Ch. D. 502.
(5) 36 Ch. D. 787.
(6) [1895] 2 Ch. 673: see p. 686 et seq.
(7) 4 Ch. D. 827.
(8) [1894] 2 Ch. 239.
(9) 41 Ch. D. 1.

no ingenious process of book-keeping can alter the fact. It is not denied that in this case the annual receipts did exceed the annual outgoings, and, the dividends having been paid out of the excess, the allegation that they were paid out of capital is not accurate. But, as already pointed out, it does not at all follow that the course adopted by the directors in declaring dividends year after year as they did was legally justifiable. It cannot be denied that the balance-sheets and profit and loss accounts concealed the truth, as now known, from the shareholders, and were, as it now turns out, grievously misleading. The shareholders were never told that the paid-up capital was being constantly diminished by bad debts, as now appears to have been the case. The shareholders were told every year that proper provision was made for such debts, and now that the case has been thoroughly investigated it is really reduced to the question whether Mr. John Cory was justified in making the statements he did, and in dealing as he did with debts which have now been ascertained to be bad. It is easy to be wise after the event, and there is danger in treating a director as knowing years ago what now appears to be the fact. But it is the duty of the Court to examine the state of things as they appeared to him when the dividends were declared, and to determine whether he was justified in what he did by what he knew or ought to have known. What he ought to have known is as important as what he knew.

It was stated in the judgment of this Court in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (1) that, if directors act within their powers—if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience—and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to the company. We believe this statement of the law to be correct, and we adopt it as our guide. It has been shewn that in this case the dividends did not in fact come out of the paid-up capital of the company. Fraud is not established against Mr. John Cory, nor is there any proof that he was acting in the interest of his own friends or of himself, and

(1) Ante, p. 392.

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

not bonâ fide with a view to the interest of the National Bank. The inquiry, therefore, so far as he is concerned, is reduced to the representations which he made as to the position of the company, and his alleged want of care and attention to the affairs of the bank, and more particularly to his omission to find out that the manager was misleading the directors. In the *Lagunas Case* (1) it was said, and we repeat it, that the amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although, if they had taken more care, they might have avoided them: see *Overend, Gurney & Co.* v. *Gibb.* (2) Their negligence must be, not the omission to take all possible care; it must be much more blameable than that: it must be in a business sense culpable or gross. We do not know how better to describe it. Some useful observations justifying the expression "gross negligence" will be found in Lord Chelmsford's judgment in *Giblin* v. *McMullen.* (3)

It is not, however, necessary to enlarge on this subject.

The care which in any case can be reasonably expected to be taken is, speaking generally, the measure of the care which the law requires to be taken when there is no contract affecting the question. What we have to determine is whether Mr. John Cory was justified in making the statements which he made, and whether he could be reasonably expected to find out more than he in fact knew.

Bad and doubtful debts were constantly considered and provided for—some by being written off, some by setting aside reserve capital. Over 12,000*l.* were written off before 1890, and 13,600*l.*, or thereabouts, were written off in that year, and 70,000*l.* was set aside for reserve capital.

Such matters were considered by the directors. The accusation is that they did not do enough in this way. But here again, even if some debts known to the manager to be bad were treated as good, it is not proved that Mr. John Cory knew this, or had reason to suspect that what was done was inadequate.

(1) Ante, p. 392. (2) (1872) L. R. 5 H. L. 480.
(3) (1869) L. R. 2 P. C. 317, 336.

His evidence is clear that he neither knew nor suspected that such was the case, and that he really believed that the provision was ample.

The same question arises: Was it his duty to test the accuracy or completeness of what he was told by the general manager and the managing director? This is a question on which opinions may differ, but we are not prepared to say that he failed in his legal duty. Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest business men. But this is the whole of Mr. John Cory's shortcoming as proved by the evidence. Even his letter of January 19, 1888, on which Wright J. placed so much stress, ceases to turn the case against him if he honestly believed it to be true and if he was justified as a reasonably careful man in so believing; and we cannot say that he was not. Cases such as these are always cases of degree. In *Leeds Estate, Building and Investment Co.* v. *Shepherd* (1) the directors trusted their manager and were held liable. They did not take the trouble to see that what he did was even apparently what he ought to have done. They delegated their functions to him.

In re Denham & Co. (2) is more like the present case, and there the director was held not liable.

It must be now conceded that, if Mr. John Cory had himself studied the weekly states and quarterly returns, and had compared those for one period with those for another, and more especially if he had seen the letters addressed by the auditors to the directors, he would have been put upon inquiry and would have found out, if he had not neglected his duty, that the affairs of the bank were not in the flourishing condition in which he believed them to be.

(1) 36 Ch. D. 787. (2) 25 Ch. D. 752.

C. A. 1899 NATIONAL BANK OF WALES, LIMITED. *In re.*

The existence of the letters written by the auditors and accompanying their certificates was very much relied on against Mr. John Cory. Those letters are not produced; they were never found by the liquidator. His knowledge of them is derived from copies furnished by the auditors. The letters warned the directors annually in and after 1884, and especially in January, 1890, that there were matters which required investigation, and if Mr. John Cory had known or suspected that there were such letters, and he had omitted to make inquiries into the matters to which attention was drawn, he would plainly have neglected his duty as a director, and have been guilty of negligence to the degree justifying the epithet gross. But he had no reason to suppose there were any such letters, and apart from them the auditors' reports justified him in supposing that all was right. The letter from the auditors of January 13, 1890, to the secretary of the bank was answered by the secretary on February 13, 1890, saying it had been laid before the board, and it was true that this had been done on the 10th. But Mr. John Cory was not there. He was apparently present at a subsequent meeting at which the minutes of the meeting of the 10th were confirmed, but the matter did not attract his attention, and, considering the terms of the minute, this was very natural. We are satisfied that these letters from the auditors were fraudulently concealed from Mr. John Cory, and that he never knew of or suspected their existence. His ignorance of them was not attributable to negligence on his part.

His omission to examine the weekly states and quarterly returns is also, we think, excusable, although not on the same grounds, for they were known by him to exist, and were in the board-room for inspection. We have had the advantage of an exhaustive examination of them and of a comparison of long series of them, and we know the result and their full significance. But, without a comparison of those for one period with those of an earlier period, a director would derive little information which was really useful. No suspicion being aroused, Mr. John Cory's reasons for not examining them are natural, and his omission to examine them does not shew

want of reasonable care and attention on his part to the affairs of the bank. He had no reason to suppose that there were unsatisfactory debts beyond those written off and provided for.

The evidence when carefully sifted unquestionably shews that Mr. John Cory might have found out that he was being deceived by the general manager, and that the dividends declared were not in a business sense warranted by the profits made. On the other hand, the evidence shews that, although he was deceived, he neither knew nor suspected it.

We are not prepared to say that he was guilty of any breach of duty in not discovering that those whom he trusted were misleading him; nor that in point of law he was guilty of any breach of duty in recommending the payment of dividends as and when he did. A director does not warrant the truth of his statements; he is not an insurer. But if he makes misstatements to his shareholders he is liable for the consequences, unless he can shew that he made them honestly, believing them to be true, and took such care to ascertain the truth as was reasonable at the time. This we think Mr. John Cory did.

It follows that Mr. John Cory is not only not liable to make good the dividends declared, but also that he is not liable to refund those which he himself received as a shareholder, whether before or after June 14, 1889, for there was no breach of trust in this matter by him. His conduct before that date was not more remiss than it was afterwards.

As regards the advances made to directors without security between June 14, 1889, and December 18, 1890:—

The lien given by art. 15 came into existence automatically, and gave the company an equitable charge on the shares, with a power of sale, which is very important. It certainly constituted a security: *In re General Exchange Bank.* (1) Art. 98 enumerates what the board may do, and presupposes consideration and attention by them; and we are of opinion that no credit was to be given, and no advance was to be made, to a director without deliberation by the board nor without security, and if so made it would be difficult to justify the advance by falling back on the lien conferred by art. 15. But we cannot

(1) (1871) L. R. 6 Ch. 818: see p. 821.

C. A. 1899 — NATIONAL BANK OF WALES, LIMITED, *In re.*

go the length of saying that shares in the bank might not be accepted as security on reasonable deliberation, if of adequate value. We do not overlook the fact that their value depends on the value of the assets of the company lending its money on them. This renders care and deliberation all the more necessary, whether the borrower was a shareholder or a director. But in either case we are of opinion that shares in the bank might be accepted as security, if the board considered them sufficient as regards value. Suppose the board considered a proposed advance, and, being satisfied that the shares would sell for considerably more than the sum advanced, authorized an advance upon them, and obtained a deposit of the share certificates of the borrower as security. We do not think they would have failed in their duty, even if the borrower were a director. This being so, we cannot hold the board liable in point of law for omitting to obtain the certificates; for their lien and power of sale under art. 15 would not be defeated by the absence of the certificates, and we do not understand that any loss has been sustained by the bank by reason of the absence of certificates. In substance, therefore, we agree with the view of Wright J. on this point.

Now let us see what was done by Mr. John Cory. Large advances were made to some directors in 1889 and 1890. We leave out of account the advances made in 1891, as Mr. John Cory was not then a director. It is proved that in 1889 and 1890 Mr. Crawshay, one of the directors, was constantly allowed to overdraw. The branch manager at Bridgend perpetually drew attention to this and wrote for instructions, but apparently got none. Crawshay was a large shareholder in the company, and the market value of his shares exceeded his advances and overdrafts. Other deeds and documents were apparently also held by the bank as a security. Other similar cases are given by the liquidator. These advances and overdrafts have resulted in large losses.

The directors clearly regarded the lien as a security, and a "stop share" book was accordingly ordered to be kept in 1884, in which all shareholders' overdrafts were to be entered. There is no proof that, if the shares could, in point of law, be taken

as security, they were insufficient at the time they were taken. The securities were never reported to the board as insufficient; nor did Mr. John Cory know or suspect they were so. His cross-examination on these matters shews that many very material facts were concealed from him, e.g., the fact that a director was a partner in a borrowing firm; the amounts to which some of the directors obtained advances, or were indebted to the bank; the insufficiency of the securities. Moreover, several of the advances which have resulted in loss were not sanctioned by him, and were made without his knowledge.

The question of course again arises whether Mr. John Cory ought not to have been more vigilant. The observations already made on this head need not be repeated. Nor is it necessary to examine in detail his liability for other improper advances. Here, again, his answer is the same, and his liability depends on his omission to find out the facts. His liability for that omission has been already considered and negatived.

Having arrived at the above conclusions, it is unnecessary to decide whether Mr. John Cory's counsel were right in their contention that, assuming him to be liable to make good the dividends declared whilst he was a director, the liquidator, as representing the shareholders in the bank, could not have recovered those dividends from him. The argument was that all moneys recovered by the liquidator would have to be distributed amongst the shareholders, who had already had the benefit of the dividends improperly declared, so that they would in effect be paid twice over. In the course of the argument it was pointed out that the money sought to be recovered was, if recoverable, an asset of the company, and that the liquidator was the person to get it in; and that *Turquand* v. *Marshall* (1) has no application to claims by incorporated companies. We pointed out that the money which had been divided in years gone by had been paid and received as profits, and not as capital, and that Mr. J. Cory

(1) L. R. 4 Ch. 376.

C. A. 1899 NATIONAL BANK OF WALES, LIMITED, *In re.*

could not treat the shareholders whom, on the present assumption, he would have misled, as having received the dividends as capital. We said that we agreed with the observations of Cotton L.J. in *Flitcroft's Case* (1) as we understood them, namely, that the Court could and would prevent the liquidator from taking any proceedings which were useless and vexatious, but that this proceeding in the case supposed would be neither the one nor the other. On this part of the case we agree with Wright J.

Lastly, we think it only due to the liquidator to add that, although Mr. John Cory has succeeded in his appeal, his conduct justified the closest scrutiny. But the order appealed from ought to be reversed, and, having regard to the serious charges made against him, the liquidator must pay Mr. John Cory his costs both of the summons and of his appeal.

Solicitors: *Michael Abrahams, Sons & Co.; Riddell, Vaizey & Smith, for Thos. Williams, Neath; Burton, Yeates & Hart.*

(1) 21 Ch. D. 519.

W. L. C.

In re HOPE.
DE CETTO *v.* HOPE.

[1899 H. 660.]

C. A.
1899
BYRNE J.
May 16.
C. A.
July 14, 15.

Settled Estate—Heirlooms—Sale—Onus of Proof—Tenant for Life, Extravagance of—Remaindermen, Wishes of—Settlor, Intention of—Discretion of Court—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 37—*Appeal—Hearing before Two Judges—Supreme Court of Judicature Act*, 1899 (62 & 63 *Vict. c.* 6).

A tenant for life applying to the Court under s. 37 of the Settled Land Act, 1882, for leave to sell heirlooms with a view to obtaining an increased income, must shew that the proposed sale is in the interests of all parties entitled under the settlement, and the fact of his having got himself into difficulties by his own extravagance is not a circumstance which will have any weight with the Court in favour of a sale.

If the application is for leave to sell an heirloom of unique character and historical repute, such as a famous jewel or work of art, the Court, in the exercise of the judicial discretion given to it by the Act, will have regard to the intention of the settlor and also to the wishes and feelings of the remaindermen.

Decision of Byrne J. affirmed on appeal before two judges of the Court of Appeal under the Supreme Court of Judicature Act, 1899.

Decision of Chitty J. in *In re Hope's Settlement*, note (1), post, p. 691, approved of.

Under the will dated April 11, 1876, of Anne Adéle Hope, widow, deceased, her grandson, Lord Francis Hope, became entitled as tenant for life of certain estates thereby devised in strict settlement. These estates included the Deepdene estate, in Surrey, on which was the principal mansion-house of the settled property. On the death of Lord Francis without issue, the estates were settled upon his sister, Lady Beatrice Adeline Lister-Kaye, for life, with remainder to her first and other sons in tail male, with remainder to another sister, Emily Augusta, Princess Doria, for life, with remainder to her first and other sons in tail male, with remainder to another sister, Florence Josephine Pelham Clinton, for life, with remainder to her first and other sons in tail male, with remainder to his brother, the Duke of Newcastle, in fee. By the will certain chattels were

C. A. 1899 HOPE, *In re.* DE CETTO *v.* HOPE.

settled so as to devolve with the estates as heirlooms. The heirlooms included a valuable collection of Dutch and Flemish pictures, known as "The Hope Collection," and also a celebrated blue Indian diamond, generally known as the "Hope," or sometimes as the "Tavernier," blue diamond.

At present Lord Francis, who was thirty-three years of age, was married, but had no children. His three sisters named in the will were all living. The eldest sister, Lady Beatrice A. Lister-Kaye, was aged thirty-seven, and had one son only, aged seven. The second sister, the Princess Doria, was aged thirty-five, and had one son only, aged fourteen. The third sister was a spinster.

In June, 1893, Lord Francis Hope, being in financial difficulties, applied, as tenant for life, to Chitty J. for his sanction to a contract for the sale of the Hope collection of pictures. His Lordship, however, declined his sanction, the remaindermen opposing the sale, and his Lordship being of opinion that the applicant had shewn no special grounds for a sale beyond his financial position, which was the result of his own extravagance. His Lordship's judgment is reported in note (1.) at the end of the present report. In 1895 Lord Francis became bankrupt, but obtained his discharge in 1896. By a deed of arrangement executed in 1895 his life interest in the Hope settled estates was vested in trustees until a sum of 210,000*l.* had been provided, one of the trusts being to pay out of the net income of the estates the annual sum of 2000*l.* for the maintenance, support, and benefit of Lord Francis, his wife and family; and there was also a trust for investment of the residue of the income for the purpose of creating a sinking fund. In July, 1898, Romer J. sanctioned a sale of the pictures above mentioned, the opposition of the remaindermen being withdrawn, and ordered that the trustees of the settled estates should pay out of the income of the investments of the purchase-money 600*l.* per annum to Lady Beatrice A. Lister-Kaye for the maintenance and education of her infant son, and that the residue of the income should be paid to the trustees of the deed of arrangement of 1895, to be applied as part of the net income under that deed, except that such residue should

first be applied towards making up the sinking fund under the deed. The pictures were sold by tender in chambers, and realized 121,550*l.*, being 16,550*l.* more than the price in the provisional contract originally submitted to the Court.

Lord Francis now applied by summons for an order under s. 37 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), approving a provisional contract made in December, 1898, between the applicant and L. M. Lowenstein & Co. for the sale of the above-mentioned blue diamond. The contract price was not actually stated in court, but was said to approximate closely to the sum of 18,115*l.*, being the value at which it had been estimated in an affidavit by Mr. Streeter, jeweller, of New Bond Street, read on behalf of the applicant. The diamond was stated to have formerly been one of the Crown jewels of Louis XIV. of France, and was purchased by the applicant's grandfather. It weighs 44¼ carats, and is set in a brooch surrounded by twenty-two brilliants. It had not been used for many years, and had since 1894 been deposited at Parr's Bank, Cavendish Square. (1)

In his affidavit in support of the present application, Lord Francis stated that he was no better off for the sale of the pictures, as the residue of the income of the purchase-money, after paying the 600*l.* per annum to Lady Beatrice A. Lister-Kaye, was required for the purposes of the sinking fund under the arrangement deed. He also stated that the income of the estates, amounting to about 16,500*l.* per annum, was not sufficient, after payment of all prior charges thereon, for the payment of more than 1500*l.* of the 2000*l.* per annum provided for his maintenance by the trust deed, there being thus no surplus income available for the sinking fund. With regard to the blue diamond, he stated that, as it had been for a considerable time deposited at Parr's Bank, it at present afforded neither pleasure nor utility to himself or his wife, while it represented a considerable sum of money which, if the diamond were sold, might be invested in remunerative securities, the income of which would be an important addition to the income arising from the settled estates; that it would be more beneficial

(1) See further particulars in Note A, p. 694 below.

C. A. 1899 HOPE, *In re.* DE CETTO *v.* HOPE.

to himself and the remaindermen that this additional income should be secured than that the diamond should be retained; and that neither his own income nor that of his sister, Lady Beatrice A. Lister-Kaye, rendered the retention of the diamond desirable or suitable. He added that he had been advised that the price of large diamonds had tended to decrease during the last few years for various reasons, amongst others the extensive production of diamonds from the Kimberley mines in South Africa, and also by reason of a large blue diamond having recently come into the market, thus depriving the "Hope" diamond of its unique character.

Mr. Streeter, the jeweller, in his affidavit in support of the application, stated that when arriving at his estimate of the value of the diamond, together with its surrounding brilliants, at 18,115*l.*, he had not been informed nor was he aware of the price actually stated in the contract; that in estimating its value he had taken into consideration its historical interest; that he had, however, valued it at less than he would have done a short time previously, because recently a large blue diamond in the rough (being that referred to in the applicant's affidavit), double the size of the "Hope" diamond, had come into the market, which had been cut and divided into a fine lozenge-shaped diamond and a fine drop, the two diamonds weighing in the aggregate 34 carats. He added that the "Hope" diamond had previously been considered the only blue diamond of any importance known, but that the advent of the two diamonds mentioned above naturally reduced its value.

The application was opposed by all the remaindermen. Lady Beatrice A. Lister-Kaye filed an affidavit in opposition, in which she stated that if her son came into possession of the settled property he would have an income of 16,000*l.* a year and upwards, and that his social position would be such as to justify the retention of the jewel in question; that, if she survived Lord Francis and came into possession of the property as tenant for life, she should be desirous of using and enjoying the jewel, which use would be entirely consistent with the social position she would then be able to maintain; that the wishes of her sisters and her brother, the Duke of Newcastle, were in entire accord with hers, and that they were agreed tha

there was no necessity for the sale of the jewel, which ought to be retained and go with the other property settled by the will; and that she had reluctantly consented to the sale of the pictures on account of the expense and risk involved in retaining them, also from her desire to assist her brother, Lord Francis, and on account of the opportunity it gave her of having her son educated at Eton, which she considered essential to his taking a proper social position in life.

G. I. F. C.

The application was heard before Byrne J. on May 16, 1899.

Farwell, Q.C., and *Martelli*, for Lord Francis Hope, the tenant for life. An heirloom of this kind is damnosa hæreditas. It is too valuable to wear or keep in the house, and does no one any good at the bank. Having regard to the difficulties in which the tenant for life now is, it is most desirable to obtain an increase of income by selling the jewel. Blue diamonds are curious rather than beautiful, and, having regard to the fact that other blue diamonds have been discovered, it is for the good of all persons interested to dispose of this jewel before it loses its unique character and depreciates in value. Can it be for the interest of the family to keep this jewel locked up in a bank for the next thirty years? Sect. 37, under which this application is made, provides that where chattels are settled as heirlooms, "a tenant for life of the land may sell the chattels or any of them"; that the money arising by the sale shall be "capital money" under the Act, and be invested and applied accordingly, and that a sale shall not be made without an order of the Court. The Act does not require the consent of the remaindermen at all. The only thing the Court has to consider is that the proposed sale will be for the benefit of all parties concerned. A sale now will increase the income for the tenant for life, and will probably produce a higher price now than it will in a few years' time. The opposition is merely fanciful.

Mulligan, Q.C., and *A. àB. Terrell*, for Lady Beatrice A. Lister-Kaye and her son. Public considerations do not

C. A. 1899 — HOPE, *In re.* DE CETTO *v.* HOPE.

intervene: *Lord Henry Bruce* v. *Marquess of Ailesbury.* (1) The pecuniary position of the tenant for life is not the test: the Court is to "have regard to the interest of all persons entitled under the settlement"; this includes wishes and sentimental feelings: *In re Marquis of Ailesbury's Settled Estates* (2); *Dowager Duchess of Sutherland* v. *Duke of Sutherland.* (3) The fact that the tenant for life has an insufficient income through his own extravagance is no reason for a sale: *In re Hope's Settlement* (4); *In re Beaumont's Settled Estates.* (5) If it be necessary to shew special value the jewel is unique, of world-wide reputation, and is always known as the Hope diamond. It had been specially noticed in the current Encyclopædia Britannica, under the title "Diamond," as follows: "Some (diamonds) are valued for other properties, as the Hope diamond of a rare colour, a fine blue and high brilliancy, estimated at 25,000*l.*, though only weighing 44¼ carats." The tenant for life does not shew that there is a necessity for the sale for the good of the estate, as was done in *In re Earl of Radnor's Will Trusts.* (6) The onus is on the tenant for life to make out a case for a sale, which he has not done.

Benn, for the Duke of Newcastle, who, though not a respondent to the summons, had been served by the direction of the master, adopted this argument.

J. K. Young, for mortgagees of the life estate, did not oppose a sale.

Farwell, Q.C., in reply. There can be no sentimental interest in a jewel of this kind: it is not like selling an old mansion-house or family portraits. It is not the wishes of the parties, but the interest of the parties concerned, that ought to be considered.

BYRNE J. In this case Lord Francis Hope, who is tenant for life of certain estates and property, applies to the Court for an order sanctioning the sale of the celebrated Hope diamond. He is thirty-three years of age, and at present has no child.

(1) [1892] A. C. 356, 363.
(2) [1892] 1 Ch. 506, 536, 541.
(3) [1893] 3 Ch. 169, 189.
(4) See note (1), post, at p. 691.
(5) (1888) 58 L. T. 916, 918.
(6) (1890) 45 Ch. D. 402.

Lady Beatrice Lister-Kaye is the next tenant for life, and she has one son, an infant. Princess Doria is the next tenant for life, and has one son, aged fourteen. The next person in succession is Lady Pelham Clinton, who is a spinster, and the ultimate interest in the property is in the Duke of Newcastle in fee.

Lord Francis Hope asks the confirmation of the Court to a particular contract for sale of the diamond. So far as that is concerned, I have already intimated my opinion that I could not under any circumstances sanction it, because the evidence before me shews such a wide divergence between experts, that I could not say I was satisfied that the fair market price was to be given for it. But I am asked to decide this case on the footing that it is an application for the sale of the diamond in a proper way. There is a passage from the judgment of Chitty J. in the case of *Earl of Radnor's Will Trusts* (1) which is repeated by Lord Esher in the Court of Appeal with approbation. Lord Esher says: "I think, therefore, that the passage in the judgment of Mr. Justice Chitty, in which he lays down the mode in which the law is to be exercised in the court of first instance, is correct. 'I desire,' he says, 'to repeat here what I have said before, that this controlling power of the Court is a discretionary power, and that it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself, I say emphatically that this discretion ought not to be crystallized, as it would become in course of time by one judge attempting to prescribe definite rules with a view to bind other judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each particular case.'" Lord Esher says: "I agree with every word of that, and say that that is the right rule." That does not mean that a judge ought not, in considering the grounds upon which he ought to go in exercising his discretion,

(1) 45 Ch. D. 418.

C. A. 1899 HOPE, *In re.* DE CETTO *v.* HOPE. Byrne J.

to notice what other judges have before him had regard to as circumstances to be taken into consideration in various cases. There has already been an application before Chitty J. for the sale of certain pictures belonging to this estate (1), and on the occasion of that application, while the intended sale was opposed by the rest of the family, Chitty J. refused to sanction such sale at the instance of Lord Francis Hope.

The applicant himself had in that case made the pictures homeless. That reason does not apply in the present case, because the custody of the jewel in question is probably just such custody as it would have had, namely, that of the bank, if the tenant for life had not been extravagant and had not rendered it impossible for him to live at Deepdene, the family mansion. Then another argument was brought forward with reference to his financial position, and on that occasion the learned judge said (1): "that is not a circumstance which affects the rest of the family and those who succeed. I desire not to use any harsh term, but that is a circumstance which has been brought about by his own extravagance; and I have said before, and I repeat it, that as a general rule the fact of the tenant for life having got himself into difficulties is not a circumstance which ought to have weight in deciding in favour of a sale." There the learned judge had what I also have here, the strong opposition of all the other members of the family, and he proceeds to say that although "this Act of Parliament does not give any special intimation to the Court as to the grounds upon which it is to allow, or to decline to allow, a sale, yet I think that a person who comes to the Court under the Settled Land Acts and asks the Court's sanction to a sale must make out a case for a sale."

Now, what have I here? Not the case of a tenant for life who, if certain heirlooms were sold, would be able to take his natural position as head of the family and reside in the family mansion, taking up that position which probably the testatrix anticipated he would take; but I have the case of a tenant for life who is unable to occupy that position. It is reasonable and fair, and proper ground to take into consideration if substantial

(1) See note (1), post, at p. 691.

relief can be given in the way of increasing income to a member of the family. That is a circumstance to be taken into consideration; but what I have here is the possession in the family of a settled jewel, which is acknowledged to be unique —unique as being the first known, and until recently the only known, blue diamond, and one which has taken its name from the family and is known all over the world as the Hope diamond. There is evidence to shew that it is no longer unique in the sense of being the only known blue diamond in the world; but I cannot from that circumstance say on the evidence that the diamond itself does not stand out as a jewel unique from its size, from the circumstances connected with its history, and from its being a world-wide known diamond. I appreciate Mr. Farwell's suggestion to the full that the argument in favour of having regard to what may be called feelings of sentiment on the part of the family does not apply in the same way, or perhaps with the same strength, to the case of the possession of a family jewel without any particular family history attached to it, as it does in the case of an old mansion-house, or of pictures of ancestors which have been in the family a great number of years, but it is nevertheless a possession to which people, I cannot say unreasonably, do attach very great value, when they are the possessors of some unique article. I may, by way of illustration, mention such a thing as the "Warwick Vase." I do not know the particular history of that particular vase, but the possession of a unique work of art or natural object may well be an object of pride in a family. I do not think that is to be disregarded. I do not think that too much weight should be attached to it, but I think it is a circumstance to be taken into consideration. Then I have another circumstance in this case, and it is this. Every member of the family who is now in existence (except Lord Francis) and interested in this is opposed to the sale, and, further, there is no evidence before me to shew that Lord Francis would get any usable further income for himself. It may or may not be that some such arrangement could be made, but at present there is none such.

Giving the best consideration I can to the facts of the case

C. A. 1899. HOPE, *In re.* DE CETTO *v.* HOPE.

and to the arguments that have been addressed to me, I do not think that I ought to say it has been made out to my satisfaction that this is a proper case in which to sanction the sale as being to the interest of all the parties. I think, therefore, there is nothing for me to do but to refuse this application.

W. C. D.

C. A.

Lord Francis Hope appealed.

The appeal was heard on July 14 and 15, 1899.

Sir E. Clarke, Q.C., Farwell, Q.C., and *Martelli*, for Lord Francis, adopted the same argument as was urged in support of the application in the Court below.

Mulligan, Q.C., and *A. àB. Terrell*, for Lady Beatrice A. Lister-Kaye and her son,

Benn, for the Duke of Newcastle,

J. K. Young, for the mortgagees of the life-interest, and

E. S. Ford, for the trustees of the will, were not called upon.

LINDLEY M.R. It is clear to us that this is not a case in which we ought to differ from the learned judge below. I do not wish to say anything unpleasant or unkind of Lord Francis Hope, but it is quite obvious that he is a person who has brought these difficulties upon himself. I do not say that is a conclusive reason against him, but certainly it is a circumstance that has to be considered. When we consider the question for whose benefit the proposed sale will be, it is clear upon the affidavits that it will be of no benefit to any one but Lord Francis himself. The sole object of it is to increase his income, and not only does no one else want a sale, but everybody else interested objects to it; and although Mr. Farwell has tried to minimise what he calls the "sentiment" in the matter, we are fully aware of the real object of this application. Possibly it is to a great extent a matter of sentiment. Perhaps this diamond may not be of great value regarding it merely from an historical point of view, as it may be that there are other jewels with a longer pedigree; but at all events the family object to its being parted with; they care about it enough for that. But we cannot judicially ignore the fact that this is a very beautiful

and at present almost unique diamond of a colour and size not seen in modern times. We were impressed with the evidence that another blue diamond has recently been discovered in South Africa, and possibly there may be more; but we are not satisfied that there is any reason to suppose that the value of this particular diamond will be thereby diminished, at all events to any substantial extent. The evidence against the proposed sale of this diamond is overwhelming. If so, why should it be sold? I think Chitty J. was quite right when he said in *In re Hope's Settlement* (1) that when a tenant for life comes to the Court under s. 37 of the Act of 1882 for leave to sell heirlooms, there must be some reason to induce the Court to give its sanction, and that the fact of the tenant for life having got himself into difficulties was not a circumstance which ought to have weight in deciding in favour of a sale. The observations which I made in *In re Marquis of Ailesbury's Settled Estates* (2), and to which Mr. Farwell referred, as to the tenant for life being master of the situation, were, in my opinion, quite right. I was then addressing myself to a case under s. 3 of the Act of 1882, and there the tenant for life was master of the situation in the sense that he could have ruined the sale of the estate by selling it separately from the mansion-house. I was not addressing myself in the least to the question on whom the burden of proof lies as to whether a sale is for the benefit of all parties interested under the settlement.

I think Chitty J.'s view was right when he said in *In re Hope's Settlement* (1)—when the question of the pictures was before him—"a person who comes to the Court under the Settled Land Acts and asks the Court's sanction to a sale must make out a case for a sale." We cannot say that whenever a tenant for life wants a sale the Court should sanction it. I do not go that length at all. In the present case I see no reason for the sale of this diamond except that an extravagant tenant for life wants it sold. I cannot see that it is for the benefit of any one else. The learned judge below has taken this view, and I should have taken the same if the case had come before me in the first instance. The only point Mr. Farwell made

(1) See note (1), post, at p. 691. (2) [1892] 1 Ch. 506, 536.

C. A.
1899
HOPE, *In re.* DE CETTO *v.* HOPE.
Lindley M.R.

which impressed me was the fact that the estate duty has to be paid, and that must be taken into consideration, and no doubt the payment of estate duty under the Finance Act, 1894, renders it necessary sometimes to break up family collections, but I am not prepared to say that this particular diamond should be sold for that reason. It cannot be sold without making out a strong case, and that the applicant has not done. The appeal must be dismissed, and with costs.

ROMER L.J. I agree with the Master of the Rolls in all that he has said in this case, and I will only add a few words.

The only reason for this application is that the tenant for life may increase his income. At the present time he has an allowance of 2000*l.* a year from his creditors as his means of support, he having by his past extravagance dissipated the whole of his income. One cannot help seeing that, but for the extravagance I have referred to, no such application as this would have been made. The application has been opposed by all the other members of the family interested in the settled estate, and I do not think we ought to minimise, as counsel asked us to do, the feeling of the family with respect to this diamond. It is a diamond called by the name of this family and is widely known. A philosophic mind might possibly smile at a feeling of pride in the possession of a celebrated jewel, but the Court cannot ignore the existence of that feeling. We sitting here as men of the world must in dealing with questions of this kind take cognizance of the fact that many families do take pride in possessing a jewel so widely known and of such a unique character as this diamond; and the Hope family may in this case fairly say that they do desire that they should retain this jewel so widely known and passing under the family name. I do not think that we ought to refer solely to the Settled Land Act and say that the intentions of the testatrix, the settlor, should be ignored. The testatrix has wished this diamond to pass as an heirloom: that wish we cannot ignore. In point of fact, she did attach a special value to this diamond for she has settled it with the estates. I do not think it was the intention of the Settled Land Act that the intention of the

testator or settlor with regard to heirlooms should be disregarded. The Court, sitting here and considering an application as to whether it ought to order a sale of heirlooms, ought to consider all the circumstances of the case, the intention of the testator and the wishes of the family, and also the interests of the family—whether it would be for the benefit of the estate as a whole that the heirlooms should be sold. I cannot help thinking that if this estate is looked at apart from the condition of the present tenant for life—as an estate bringing in some 16,000*l.* a year—the family might well desire that it should possess, among its heirlooms, a jewel of this size and value.

For these reasons I am of opinion that the judgment of the Court below is right, and that the appeal should be dismissed.

[This was the first case heard before two judges of the Court of Appeal under the Supreme Court of Judicature Act, 1899, which received the Royal Assent on June 6, 1899. Prior to the case being entered on the list for hearing before two judges, the necessary consent was filed under s. 1. That section reserves the same right of appeal to the House of Lords as if the hearing and determination had been before three judges.]

Solicitors: *Maddisons; Leman & Co.; Richard Smith & Sons, for Marshalls & Bate, East Retford; Devonshire, Monkland & Co.; Rickards & Nightingale.*

G. I. F. C.

---

(1) Chitty J., June 10, 1893.

In re HOPE'S SETTLEMENT.

The facts and result of the evidence sufficiently appear in the judgment.

Farwell, Q.C., and *Hadley*, for the tenant for life.

Byrne, Q.C., and *A. à B. Terrell; Sir H. Davey, Q.C.*, and *Method*, and *S. Dickinson*, for the remaindermen.

E. S. Ford, for the trustees of the settlement.

CHITTY J. The tenant for life under the will of the late Mrs. Hope asks the Court to sanction his selling certain heirlooms. He proposed originally to sell six pictures forming the choicest part, apparently, of a collection that was, at the testatrix's death, at her house in Belgrave Square. That being opposed by the other members of the family on certain grounds, many of which would have applied specially to the sale of the six pictures, he has subsequently enlarged his application, and asks the Court to sanction his selling the whole of the collection that was in Belgrave Square, consisting of eighty-three pictures. The

C. A.
1899
HOPE.
In re.
DE CETTO
v.
HOPE.

pictures have long been in the family. The evidence of a gentleman well entitled to speak upon the subject is that many of them were acquired direct from the artists. The different witnesses describe the pictures in glowing terms, and I am by no means suggesting that their praise is too high. The collection is spoken of by one witness as being "superb" and as being "unique"; and though the pictures vary in merit, the collection as a whole is certainly a very valuable one.

Now, the circumstances proper to be stated are these: the testatrix left her estate at Deepdene, where there is a mansion, which is the principal mansion on the settled property, to the present applicant as tenant for life, with remainder to his sons in tail; but he is at present a bachelor. The settlement is a strict settlement. The next tenant for life is his sister, Lady Beatrice Lister-Kaye. She is tenant for life in remainder, with remainder to her sons in tail male. The next tenant for life is Lady Emily; and the next is Lady Florence, these ladies coming in as tenants for life in succession, with the usual limitations to their sons in tail male, and, subject to these limitations, the Duke of Newcastle takes the property. There were three sums of 50,000*l.* charged on the property by the testatrix's will as it originally stood, but she paid off two of these sums in her lifetime. There was one sum of 50,000*l.* left to be paid, and that has been paid out of her personal estate since her death. The result in regard to the position of the estate at the present time is that the income of the real estate is 6700*l.*, and of the personal estate (which is liable to be laid out in land and settled in the same manner as the land is) is 6300*l.*; making a total of 13,000*l.* altogether. The Belgrave Square house was leasehold, and that was settled upon trusts corresponding with the uses of the freeholds. The present applicant, the tenant for life, exercised his power, which the Act has conferred upon him, and sold the London mansion, which he, as I say, was entitled to do, it not being the principal mansion-house on the estate. The consequence of that was that the pictures were, for the time being, left without a home; but the South Kensington Museum has been willing to provide a temporary place for the pictures; and they are now there, and no question is raised as to their safe custody. The applicant says that he requires between 6000*l.* and 7000*l.* per annum to keep up the Deepdene house. I do not think it necessary to question what expenditure he intends to cover by these sums. I take it that what is meant is that a sum of between 6000*l.* and 7000*l.* is required for a gentleman in his position to live there according to the general usages of the class of society to which he belongs. Then he says that there is a sum of 3000*l.* which he has to pay annually; and (as well as I understand his affidavit) that is made up of interest and premiums; but the affidavit is not clear, and if I thought this point at all material I should require him to make a fuller disclosure in regard to that part of his case. But it is plain that a portion (and I should say the larger portion) of this annual charge is the result of his extravagance. I certainly do not desire to use a harsh term, but I use the same language as his brother the Duke has used. Add this 3000*l.* to the 7000*l.*, there is 10,000*l.* expenditure and there is 3000*l.* left. Now there is nothing in regard to the estates themselves that calls for the

turning of the pictures into money so that more income may be produced. There is no question here of benefiting the settled land. The case presented in argument on behalf of the applicant is that it would be a wise thing in his interest to increase the income by the sale of the pictures, as proposed by the conditional contract, the sale being for a sum of 80,000*l.*, which would give an income, say, of between 2000*l.* and 3000*l.* a year more.

Now, I am referred to the Duke's affidavit. At least his opinion is that the income was quite adequate to enable his brother to live in becoming style, and to reside at the mansion-house, Deepdene; and he says that if his brother were to live within his income derived under the will of the testatrix and his other fortune, there would be no necessity for any of the pictures being sold to create further income; and he says: "The smallness of his present income arises from his extravagance and in consequence of his living beyond his income." Then the Duke adds that it is not in his opinion for the benefit of the persons interested in the estate that any of the pictures should be sold; and he states that all persons interested in the pictures, with the exception of his brother, are opposed to the proposed sale. That is shewn by the opposition which is presented on their behalf by their counsel at the bar.

Now, I have invited counsel for the applicant to mention any special grounds which they can urge in court in favour of the sale. The discretion, as I have said before, is a judicial discretion to be exercised in the circumstances of the case; but in the present case the argument necessarily begins by admitting that there are no exigencies which require a sale. At last counsel analyzed their argument into five points. I will not take them in the order in which they were presented, but will state them shortly. First it is said the applicant is tenant for life. Granted. Under the 53rd section of the Settled Land Act, 1882, he, in exercising this power as well as other powers, is to have regard to the interests of all persons entitled under the settlement, and the circumstance that he is tenant for life is a common and necessary circumstance in all these cases. The next thing said is that it is a good time to sell valuable collections; the third thing said is that a favourable offer has been made; the fourth thing said is that the pictures have no home, and the fifth thing put forward is the financial position of the applicant.

Now, it is obvious that three of these supposed grounds are not special circumstances whatever. As I have said during the argument, this would be common ground applicable to the sale of every valuable collection of paintings that happened to be settled anywhere in England. There is nothing special. The circumstance that the pictures have no home is said to be a special ground. I have said (and I repeat it) that the applicant is not to blame for having sold the mansion in Belgrave Square; but I cannot allow that as any special ground for assenting to the sale, because it is the applicant himself (though in exercise of his legal power) who made the pictures homeless.

Then in regard to his financial position—that is not a circumstance which affects the rest of the family and those who succeed. I desire not to use any harsh term, but that is a circumstance which has been brought about by his own extravagance; and I have said before, and I repeat it, that as a general rule the fact of the tenant for life

C. A.
1899
HOPE, *In re.* DE CETTO *v.* HOPE.

having got himself into difficulties is not a circumstance which ought to have weight in deciding in favour of a sale.

The result is that, when I have disposed of those two suggested special reasons, there is no reason left, and I have the strong opposition of the other members of the family; and though this Act of Parliament does not give any special intimation to the Court as to the grounds upon which it is to allow, or to decline to allow, a sale, yet I think that a person who comes to the Court under the Settled Land Acts and asks the Court's sanction to a sale must make out a case for a sale. The Legislature has allowed a tenant for life, with the sanction of the Court, to upset a testator's will; but the Court ought not, unless it sees in all the circumstances that it is a fair and proper case, to allow a sale. The Court's discretion is imposed as a fetter upon the tenant for life; and even the tenant for life in this case (though there are some words in his affidavit to the contrary) is not able to shew that in exercising this power he has had regard to the interests of all the persons entitled under the settlement.

For these reasons, I decline to accede to the application.

Solicitors: *Gadsden & Treherne; Rickards & Son; Leman & Co.; Walters, Deverell & Co.*

W. C. D.

NOTE A (p. 681 above). The following short account of the famous "Hope" diamond is compiled mainly from Precious Stones and Gems, by E. W. Streeter, 6th ed., 1898, p. 137 et seq., and The Great Diamonds of the World, by the same author, 1882, p. 291, et seq.

The Hope Blue Diamond is believed to have originally formed part of a larger diamond weighing in the rough 112¾ carats bought in India, in 1642, by Jean Baptiste Tavernier, the renowned French merchant and traveller, and sold by him, in 1668, on his return from his last voyage to India, to Louis XIV. of France. While in that monarch's possession it was recut and figured in the historic scene on February 19, 1715, when the Persian Ambassador was received by his Majesty twelve days after the former's public entry into Paris. On that occasion the King's dress was embroidered with diamonds estimated at no less than 12,000,000*l.*, the blue diamond being worn as a pendant from a light blue ribbon round his neck. What became of the stone on the King's death is not accurately known, but towards the end of the century the French regalia included a facetted diamond, triangular in shape and of an identical colour, weighing 67⅛ carats, which would be about the weight of Tavernier's celebrated purchase after it had been recut. This stone was, with the rest of the French regalia, seized in August, 1792, and deposited in the Garde Meuble, whence it was stolen in the following month. It then seems to have altogether disappeared until about the year 1830, when a blue brilliant of a similar character, and weighing 44¼ carats, came to light in the hands of a Mr. Daniel Eliason, without a history, without any account as to whence it had come or what had been its travels and fortunes. From the acknowledged rarity of stones of that character, the opinion of experts was that this new stone was only Tavernier's gem recut and altered so as to render identification difficult. Eventually it was purchased by Mr. Henry Thomas Hope, the husband of the testatrix,

Mrs. Anne Adéle Hope, and became known as the "Hope" diamond. The difference in weight between the original stone of 67⅛ carats and the present is accounted for on the hypothesis that two cleavages were made from that stone after it was stolen in 1792. In 1874 a small stone of precisely the same colour and quality was purchased at a sale in Geneva of the late Duke of Brunswick's jewels, and about 1876 another smaller stone of identically the same colour, and weighing 1¼ carat, was bought in Paris by Mr. E. W. Streeter of New Bond Street for 300*l.* No other diamond of the dark sapphire, steely-blue colour peculiar to the "Hope" diamond and to the two smaller stones above-mentioned appears ever to have been discovered. From these circumstances, and also from the fact that the Hope diamond is somewhat irregular in shape, being straighter on one side than on the other, there is a strong presumption that the two smaller stones are cleavages from the diamond stolen in 1792. "The Hope is a very lovely gem, of a most beautiful sapphire hue, with an adamantine lustre of extreme brilliancy. It was purchased by Mr. Hope for 18,000*l.*, and was considered by good judges to be worth a great deal more. Westropp values it at no less than 30,000*l.*, not an excessive figure considering its absolutely unique character, faultless texture, and exquisite form. It is unusually thick, and measures ⅞ of an inch in breadth by 1⅛ in length."

Westropp (Manual of Precious Stones and Antique Gems, 1874, pp. 6, 8) includes this gem among "the most celebrated diamonds in Europe," and describes it as "of a most brilliant sapphire blue." In Tavernier's Travels in India, edited by V. Ball, 1889, vol. ii. p. 126, there is a copy of an old plate on which is figured, in three positions, the original diamond in its rough state, as sold by Tavernier to Louis XIV. The plate is headed, "A representation of 24 y^e^ fairest Diamonds chosen out amongst all those which Monsieur Tavernier sold to y^e^ King at his last return from the Indies, upon which consideration, and for severall services done the Kingdome His Majesty honored him with the title of Noble." The plate describes the diamond, which is there marked "A," as "a diamond cleane of a faire violet."—G. I. F. C.

STIRLING J.

1899

July 28; *Aug.* 3, 9.

WALTERS *v.* GREEN.

[1899 W. 2136.]

Trade Union—Watching and Besetting—Interlocutory Injunction—Conspiracy, and Protection of Property Act, 1875 (38 & 39 *Vict. c.* 86), *s.* 7—*Practice—Parties—Misjoinder—Joint Cause of Action—Rules of Supreme Court, Order* XVI., *r.* 1.

In an action under s. 7 of the Conspiracy, and Protection of Property Act, 1875, brought by several members of an association of master builders at H., where there was a strike, against the officials of various trade unions there, the plaintiffs by their statement of claim alleged that the defendants, with the intention of compelling the plaintiffs and other members of the association to accept the terms of the unions, combined and conspired together to watch railway stations and other places where workmen imported by the association to replace the men on strike might happen to be, for the purpose of persuading those workmen not to work for the plaintiffs or any of them, or any other member of the association, and in furtherance of the said combination and conspiracy wrongfully did a series of overt acts therein specified for the purpose of persuading the workmen as aforesaid, by reason whereof the plaintiffs suffered damage:—

Held, (1.) that the allegations in the statement of claim disclosed a joint cause of action, and that, even if it were not established that all the defendants had committed the acts complained of, judgment might be recovered against some or one of them; (2.) that the plaintiffs could properly combine in bringing the action, inasmuch as the right to the relief claimed arose out of the same series of transactions, and there was a common question of fact as well as law whether all the acts complained of were done in pursuance of a combination so as to render the defendants jointly liable in respect of them.

Interlocutory injunction granted against two of the defendants.

THIS was a motion to restrain the defendants from watching or besetting any railway station in Hull or elsewhere, or the works of the plaintiffs or any of them, or the approaches to any such station or works, or any place where any persons employed or about to be employed by, or working or intending to work for, the plaintiffs or any of them, reside or work or happen to be, for the purpose of persuading such persons not to work or to abstain from working for the plaintiffs or any of them, or for any other purpose than to obtain or communicate information. A preliminary question was raised on the hearing of the motion as to whether the action was properly constituted, and the

Court directed the plaintiffs to deliver a statement of claim, which was done.

The plaintiffs were master builders carrying on business at Hull, and were members of the Master Builders' Association there. The defendants were officials of various trade unions at Hull—namely, the Operative Bricklayers' Society (Hull branch), the Amalgamated Society of Carpenters and Joiners (Hull branch), the National Association of Operative Plasterers (Hull branch), and the Hull Builders' Labourers Society—and also of a federation called the Hull Building Trades Federation, which was a union of the unions connected with Hull. It appeared that in the early part of the present year there arose a labour dispute in the building trade, and as a result a large number of men employed either struck or were locked out. In order to replace the services of the workmen so lost the plaintiffs imported workmen from Belfast in Ireland. These men entered into contracts with an agent of the masters that they would go to Hull and work as non-union men for twelve months for such firms belonging to the Masters' Association, in some cases as the association should specify, and in other cases as a particular member of that body should specify.

The cause of action was thus stated in paragraphs 9 and 10 of the statement of claim:—

"Par. 9. The defendants having ascertained that the Masters' Association were bringing workmen from other places to Hull to fill the positions vacated by the men on strike or locked out as aforesaid, thereupon, with the intention of injuring the plaintiffs and other members of the Masters' Association in their trade and business, and thereby compelling the plaintiffs and the other members of the association to accept the terms of the union and to conduct their respective businesses in accordance with the requirements of the union, wrongfully and without lawful excuse combined and conspired together to watch and beset, or cause or procure to be watched or beset, railway stations and other places where workmen brought to Hull by the Masters' Association as aforesaid or other non-union men employed or about to be employed by the plaintiffs or some or one of them might happen to be, and the approaches

STIRLING J. 1899 WALTERS v. GREEN.

thereto respectively, for the purpose of persuading or otherwise inducing such workmen not to work or to cease working for the plaintiffs or any of them, or any other member of the Masters' Association."

"Par. 10. In furtherance and execution of the said combination and conspiracy, the defendants wrongfully and without legal authority did or caused to be done the several overt acts of which particulars are stated in the next succeeding paragraph hereof for the purpose of persuading or otherwise inducing workmen brought to Hull by the Masters' Association as aforesaid or other non-union workmen working or intending to work for the plaintiffs or any of them, or any other members of the Masters' Association, and did in fact persuade or induce many of such workmen to leave Hull or refuse or cease to work for the plaintiffs or any of them, or any other member of the Masters' Association, by reason whereof the plaintiffs have been much injured and interfered with in the lawful conduct of their respective businesses, and have respectively suffered serious loss and damage."

Paragraph 11 gave particulars of the overt acts complained of. These included acts alleged to have been committed on various occasions by particular defendants against particular plaintiffs, by particular defendants against all the plaintiffs, and by the defendants generally against particular plaintiffs.

Upjohn, Q.C., and *R. J. Parker*, for the plaintiffs.

J. D. Crawford, and *E. L. Hartley*, for the defendants other than the officials of the Amalgamated Society of Carpenters and Joiners, took a preliminary objection as to the form of the action. This action is not properly constituted, and cannot be maintained in its present form. There are here several plaintiffs and several defendants, and the acts alleged against the defendants are different in character. Each one is a distinct tort and a separate cause of action by each of the plaintiffs against each defendant. There is no joint cause of action against all the defendants. The case does not fall within the provisions of Order XVI. Rule 1 of that order was altered into its present form in consequence of the decisions of the House of

Lords and the Court of Appeal in *Smurthwaite* v. *Hannay* (1), and of Lord Russell C.J. in *Carter* v. *Rigby & Co.* (2), but it does not enable a number of plaintiffs to join in an action against a number of defendants in respect of separate and distinct torts, whether the torts are separate and distinct as regards the persons against whom they are committed, or as regards the persons committing them: *Sadler* v. *Great Western Ry. Co.* (3), *Gower* v. *Couldridge* (4), and *Thompson* v. *London County Council.* (5)

Having regard to ss. 3 and 7 of the Conspiracy, and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), it is very important to the defendants that the acts alleged against them should be treated as separate and distinct torts.

The plaintiffs by their statement of claim base their action on conspiracy; but conspiracy is not of itself a good cause of action. The observations of Lord Watson and Lord Herschell in *Allen* v. *Flood* (6) shew that, subject to the specific exceptions there mentioned, the law of England does not take into account motive as constituting an element of civil wrong, and that an act not in itself unlawful is not converted into a civil wrong by the existence of a bad motive; and see *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (7); Erle on Trade Unions, p. 29; Pollock on Torts, 5th ed. p. 306. The cause of action is not the conspiracy, but the wrong done. The defendants cannot be joined in one action, because a different wrong is alleged against each; nor can the plaintiffs, because each would be required to prove that he himself had suffered special damage.

Stewart-Smith, for the officials of the Amalgamated Society of Carpenters and Joiners.

Upjohn, Q.C., and *R. J. Parker*, for the plaintiffs. The action is maintainable. Treating it, in the first place, as if it were the case of one plaintiff suing several defendants, what we allege against the defendants is that they have committed a joint tort against us by combining and conspiring to do that which is

(1) [1894] A. C. 494.
(2) [1896] 2 Q. B. 113.
(3) [1896] A. C. 450.
(4) [1898] 1 Q. B. 348.
(5) [1899] 1 Q. B. 840.
(6) [1898] A. C. 1, 92, 125.
(7) (1889) 23 Q. B. D. 598; [1892] A. C. 25.

STIRLING J. 1899 WALTERS v. GREEN.

rendered illegal by s. 7 of the Conspiracy, and Protection of Property Act, 1875, namely, to compel the plaintiffs to abstain from doing acts which they have a legal right to do. We do not seek to treat each of the acts complained of as a separate cause of action, but we use them as evidence of the joint tort in respect of which we sue. A good definition of a joint tort is to be found in Clerk and Lindsell on Torts, 2nd ed. p. 53, namely, "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design." This action is founded on *Lyons & Sons* v. *Wilkins* (1), and the real injuria here, as there, is the common design to put pressure on the plaintiffs. Conspiracy coupled with an overt act is a good cause of action, but, apart from any question of conspiracy, the statement of claim, when it alleges the combination of the defendants and the wrongful acts done in pursuance thereof, is alleging a joint tort by all the defendants. Further, it is settled that the failure of the plaintiff in an action of this description to make good his claim against all the defendants is not a ground for withholding an injunction against those who may be found liable, and, if the overt acts complained of are themselves unlawful, judgment may be obtained against a single defendant: see the cases collected in the note to *Skinner* v. *Gunton* (2); *Gregory* v. *Duke of Brunswick*. (3)

Secondly, has there been a misjoinder of plaintiffs? Looking at the combination of the defendants and at the overt acts done in pursuance of it, we say that the plaintiffs' claim to relief arises out of the same series of transactions, and that there are here common questions both of law and of fact to be determined: *Universities of Oxford and Cambridge* v. *Gill & Sons* (4); *Drincqbier* v. *Wood*. (5) The joinder of plaintiffs and the joinder of defendants are both correct.

Hartley, in reply.

[The case was then argued upon the merits.]

Cur. adv. vult.

(1) [1899] 1 Ch. 255.
(2) (1669) 1 Saund. 228 d.
(3) (1844) 6 Man. & G. 953.
(4) [1899] 1 Ch. 55.
(5) [1899] 1 Ch. 393.

Aug. 9. STIRLING J. (after stating the facts as above set out). In order to ascertain whether the action is properly constituted, let me consider what would be the case if a single plaintiff were suing all these defendants. It appears to me that the allegations contained in paragraphs 9 and 10 of the statement of claim amount to this—that the defendants jointly committed a series of illegal acts causing damage to the plaintiffs. Therefore, what is alleged is a joint cause of action. In my judgment this case is entirely distinguishable from the case of *Sadler* v. *Great Western Ry. Co.* (1), which was relied on on this point. The decision there was that claims for damages against two or more defendants in respect of their several liability for separate torts could not be combined in one action. The present case is not one of suing several defendants on account of several liability for several torts, but jointly in respect of their joint acts. Lord Davey in addressing the House of Lords in *Sadler* v. *Great Western Ry. Co.* (2) puts it thus: "I believe there is not a scintilla of allegation, nor was it intended, as the appellant's counsel fairly said, to state in the statement of claim that there was anything else than a separate cause of action—that there was anything like a joint cause of action or a joint action of any kind on the part of the defendants." In this case the allegations are of a totally different kind. I would also make a few remarks as to what the result will be supposing it is not established that all the defendants have committed the acts complained of. I think the authorities to which I was referred—*Skinner* v. *Gunton* (3), *Savile* v. *Roberts* (4), and *Muriel* v. *Tracy* (5)—shew that, even if the result of the trial be that some only of the defendants are proved to have committed those acts, judgment may be recovered against them, and even against one of them. I do not speculate on the result of the evidence at the trial; it is obvious that difficulties may arise in proving joint acts. It is enough to state now that the action is brought in respect of joint acts.

(1) [1896] A. C. 450.
(2) Ibid. 456.
(3) 1 Saund. 228 d.
(4) (1698) 1 Ld. Raym. 374, 379.
(5) (1704) 6 Mod. 169.

STIRLING J. 1899 WALTERS v. GREEN.

The next question is whether the plaintiffs can properly combine in bringing this action. That depends on the effect of the recent modification of Order XVI., r. 1. [His Lordship read the rule.] The meaning of that rule was considered by the Court of Appeal in *Stroud* v. *Lawson* (1), where Chitty L.J. says: "It is necessary that both these conditions should be fulfilled, that is to say, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law, in order that the case may be within the rule." I then ask, Are these two conditions fulfilled? It seems to me that they are, because, first, the right to relief as alleged here to exist arises out of the same series of transactions; and, secondly, there is a common question of fact as well as law, namely, whether all these acts were done in pursuance of a combination, so as to make the defendants jointly responsible in respect of them.

Now, passing by the objection to the constitution of the action, I come to the question of the plaintiffs' legal rights. On that I propose to say very little. The law is settled to a great extent by the case of *Lyons & Sons* v. *Wilkins*. (2) That action was based on s. 7, sub-s. 4, of the Conspiracy, and Protection of Property Act, 1875. [His Lordship read the sub-section and the proviso at the end of the section, and quoted from the judgment of Chitty L.J. in *Lyons & Sons* v. *Wilkins* (3) a passage commencing with the words, "To bring a case of watching or besetting within the section," and ending with the words, "attending in order to persuade is not within the proviso," and, applying the principles there laid down, he held, first, that the acts complained of were done with a view to compel the masters to conduct their business in accordance with the views of the trade unions; and, secondly, that attendance in order to persuade workmen not to work for the persons sought to be compelled was not within the proviso at the end of s. 7. His Lordship then continued as follows:—]

(1) [1898] 2 Q. B. 44, 52. (2) [1899] 1 Ch. 255.
(3) [1899] 1 Ch. 270, 271.

As regards the general nature of the acts complained of, this case is very similar to the recent case of *Charnock* v. *Court* (1); so I will say no more on that subject. There is, however, one point in which the frame of this action differs from that. In that case all the members of the Masters' Association were plaintiffs in the first instance, though ultimately some were made defendants. (2) The contracts which were made here with the workmen were made on behalf of the Masters' Association, and the workmen were to work for such members of that body as should be specified by the association or by some member thereof. They were intercepted before they went to work or any member had been specified, and it is contended that that does not cause damage to a plaintiff who had not been specified. I think that the intercepting of the men so that a particular master lost the chance of employing those particular men who were intercepted is a sufficient damage to enable the master to sue, and that it is not necessary that all the members of the Masters' Association should be plaintiffs or even parties to the action. [His Lordship then examined the evidence, and came to the conclusion that two of the defendants, Tighe and Emerson, had been guilty of going beyond what was allowed by the proviso to s. 7, but that no case had been made out against the remaining defendants. With regard to the latter his Lordship said:—] Reliance was placed on the fact that the trade unions were organised bodies, and that the defendants were permanent members and officials of the trade unions, and it was urged that upon that ground I ought to come to the conclusion that the defendants were all parties to illegal acts. I cannot act on any such view. Trade unions are legal bodies, and primâ facie their officers cannot be

(1) [1899] 2 Ch. 35.

(2) On July 20, 1899, the defendants in *Charnock* v. *Court*, [1899] 2 Ch. 35, moved to dissolve the injunction granted on April 12 on the ground that some members of the Masters' Association had been added as co-plaintiffs without their authority, and that the injunction was obtained on behalf of all the members. Stirling J. declined to dissolve the injunction, but ordered the dissentient members to be made defendants, and directed the pleadings to be amended so far as necessary. At the trial of the action at the Leeds Assizes the defendants submitted to a perpetual injunction.

STIRLING J. 1899 WALTERS v. GREEN.

presumed to have authority to do or sanction anything other than that which trade unions may lawfully do. [His Lordship granted an injunction against Tighe and Emerson similar to that granted in *Charnock* v. *Court* (1), but made no order against the other defendants. (2)]

Solicitors: *Fred Jones, for Chilman, Hull; Pattinson & Brewer; Rollit & Sons.*

(1) [1899] 2 Ch. 35. (2) See note (2), ante, p. 703.

H. B. H.

LLANDUDNO URBAN DISTRICT COUNCIL *v.* WOODS.

COZENS-HARDY J.

1899

July 25, 26; *Aug.* 2.

[1898 L. 1812.]

Foreshore—Crown Lease—Injunction—Limits of Public User.

The plaintiffs were the local authority of L., and the seashore at L. between high and low water-mark was vested in them under a lease from the Crown. W., a clergyman of the Church of England, held services and delivered addresses on the seashore without the consent of the plaintiffs, and asserted that the seashore was a highway and that he had a right to do so. The plaintiffs brought an action against W., claiming a declaration that he was not entitled to hold services, &c., on the seashore without their consent, and an injunction to restrain him from so doing. There was no evidence that the acts of W. caused an obstruction or led to a breach of the peace; nor did W. adduce any evidence of a prescriptive right or custom in support of his contention:—

Held, that the plaintiffs were entitled to the declaration for which they asked; but that the matter was too trivial for an injunction, which must be refused.

Blundell v. *Catterall*, (1821) 5 B. & Al. 268, followed.

By an indenture of lease dated February 26, 1881, the foreshore and beach between high and low water-mark at Llandudno were granted by the Crown to the Llandudno Improvement Commissioners for a term of twenty-one years from October 10, 1880, at the rent and subject to the covenants by the lessees therein contained. The lease contained a reservation of all minerals.

Under the provisions of the Public Health Act, 1875, and the Local Government Act, 1894, the lease had become vested in the plaintiffs, the Llandudno Urban District Council, who were the successors in title of the commissioners.

In June, 1898, the defendant, the Rev. John Woods, a clergyman of the Church of England, who was carrying on an anti-Ritualistic propaganda in North Wales, visited Llandudno, and requested the plaintiffs to allow him to hold religious services on the promenade and foreshore, but the request was refused. The defendant, nevertheless, began to hold meetings on the

COZENS-HARDY J.

1899

LLANDUDNO URBAN COUNCIL v. WOODS.

promenade, and on July 18 was summoned before the magistrates for committing a breach of the plaintiffs' by-laws by holding meetings on the promenade and by obstructing the free use of the same, and was convicted and fined.

Immediately afterwards the defendant began to hold meetings and deliver sermons on the beach or foreshore in lease to the plaintiffs.

On August 2 the plaintiffs issued the writ in this action, claiming, (1.) a declaration that the defendant was not entitled without their consent to hold meetings or deliver addresses, lectures, or sermons on any part of the beach or foreshore in lease to them; and (2.) an injunction to restrain the defendant from holding meetings or delivering addresses, lectures, or sermons upon the said premises in lease to the plaintiffs, and from thereby or otherwise causing crowds to collect and creating or causing noise and disturbance.

The plaintiffs by their statement of claim (paragraph 8) alleged that both the matter of the defendant's addresses at the meetings so held on the beach or foreshore as aforesaid and the violent language in which they were expressed gave great offence to the general body of visitors and residents in Llandudno, and angry discussions took place at the said meetings between the defendant and his supporters, on the one hand, and persons holding different views from them on the other hand, and such meetings seriously interfered with the free use and ordinary enjoyment by the public of the said beach and foreshore, and caused large crowds to assemble and occasioned much noise and disturbance, resulting sometimes in a breach of the peace.

The defendant by his defence denied the allegations in the 8th paragraph of the statement of claim, and also denied that the plaintiffs or their lessors in title had any right to restrain him from holding meetings or delivering addresses, lectures, or sermons on any part of the beach or foreshore in lease to the plaintiffs.

On August 6 the plaintiffs obtained an interim injunction against the defendant, which was subsequently by consent continued until the trial of the action. This was the trial of

the action. Witnesses were called on both sides as to what took place at the defendant's meetings.

Eve, Q.C., and *E. P. Hewitt*, for the plaintiffs. We do not attack the defendant's motives, but his acts are not a reasonable user of the foreshore, and the forcible language he employs at his meetings is calculated to lead to a breach of the peace. His acts are a trespass and an interference with the reasonable use of the foreshore by the majority of the public.

[COZENS-HARDY J. Is there not a strong analogy between the London parks and this foreshore?]

Whatever rights the Crown have in this foreshore, the plaintiffs have the same. The soil of it is vested in them, and, strictly speaking, it is not a highway for all purposes. There may be a right to cross it for the purposes of navigation or fishing; but there is no right to place bathing-machines on the foreshore, or even to bathe, without the plaintiffs' consent: *Blundell* v. *Catterall* (1); *Mace* v. *Philcox* (2); Callis on Sewers, 2nd ed., para. 74. It is submitted that the principle of *Ex parte Lewis* (3) applies; the public may be entitled to pass or repass along the foreshore for their reasonable enjoyment, but there is no right to hold meetings or deliver addresses. The claim put forward by the defendant can only be supported by a prescriptive right or custom, which must be proved in the usual way: *Attorney-General* v. *Wright*. (4)

Defendant in person. I claim the right, as a clergyman of the Established Church of England, to preach on the seashore as an ordinary highway. I deny that my language was intemperate, or that my meetings caused any real obstruction. The parties who objected to my services could have stayed away. In *Blundell* v. *Catterall* (1) the foreshore was private property. It belonged to the lord of the manor. This is Crown land, and is, I contend, subject to the same rights of the public as the London parks.

Eve, Q.C., in reply.

Cur. adv. vult.

(1) 5 B. & Al. 268.
(2) (1864) 15 C. B. (N.S.) 600.
(3) (1888) 21 Q. B. D. 191.
(4) [1897] 2 Q. B. 318.

COZENS-HARDY J.

1899

LLANDUDNO URBAN COUNCIL v. WOODS.

Aug. 2. COZENS-HARDY J. In this action the plaintiffs claim an injunction to restrain the defendant, who is a clergyman of the Church of England, from delivering addresses, lectures, or sermons upon the foreshore at Llandudno, which has been leased by the Crown to the plaintiffs for a term which will expire in 1901. The plaintiffs have, in respect of the promenade at Llandudno, by virtue of by-laws approved by the Local Government Board in 1878, the right of preventing any public address from being delivered, and they took proceedings against the defendant before the magistrates for breach of these by-laws. This action in no way relates to the promenade. Between the foot of the promenade and the commencement of the foreshore is a strip about which I know nothing. The defendant has sometimes delivered addresses from this strip. But this action in no way relates to this strip. In June, 1898, he applied civilly to the plaintiffs for permission to hold religious services on the shore. In reply he received the following answer: "Dear Sir,—Your application for permission to hold religious services on the beach was submitted to my council this afternoon, when I was requested to express regret that they cannot accede thereto, inasmuch as they have granted a similar privilege to the organization which has been in the habit of visiting Llandudno in past years and purposes to come again this season. Yours truly, (Signed) Alfred Conolly." I may observe that the organization referred to in this letter is not antagonistic to the defendant, and that there is ample space on the extensive shore for more than one service. The defendant has since held services on the shore until he was restrained by an interlocutory injunction. The evidence satisfies me that there was no breach of the peace, no disorder worth mentioning, and no inconvenience, except of the most trivial kind, to any of the public resorting to the shore. It is, however, contended on the part of the plaintiffs that they are entitled as lessees to the possession of the foreshore, and that the public have no right at common law to enter upon the shore, when dry, except for the purposes of navigation or fishing. I think I am bound by the decision of the majority of the judges of the Court of King's Bench in 1821, in *Blundell* v

Catterall (1), to hold that, in strict law, this proposition is well founded. The public are not entitled to cross the shore even for purposes of bathing or amusement. The sands on the sea-shore are not to be regarded as, in the full sense of the word, a highway. A more extensive right may possibly have been gained by prescription or by custom either by individuals or by the permanent or temporary inhabitants of Llandudno; but the existence of this more extensive right must be proved, and will not be presumed in the absence of proof. The plaintiffs have, therefore, primâ facie a right to treat every bather, every nursemaid with a perambulator, every boy riding a donkey, and every preacher, on the shore at Llandudno as a trespasser. In the present case there is no evidence from which I can find the existence of a legal usage or custom entitling the defendant to deliver sermons or addresses on the shore at Llandudno. The defendant seems to imagine that his position as a clergyman of the Established Church, bound to preach the Gospel both in season and out of season, gives him some special and peculiar rights. It is needless for me to say that this contention cannot for one moment be maintained. I must treat the defendant precisely as I should treat a Roman Catholic priest, a Methodist preacher, or a Salvation Army captain. This Court has nothing to do with the truth or falsehood of the doctrines which the defendant has preached. I feel bound to say that I consider this action wholly unnecessary, and one which ought not to have been brought. It is no part of the duty of the council, as lessees from the Crown for an unexpired term of two years, to prevent a harmless user of the shore. There are persons who derive satisfaction from listening to the addresses of the defendant, and the defendant derives satisfaction from delivering these addresses. I cannot conceive why they should be deprived of this innocent pleasure. Nobody is obliged to listen. Nobody is molested. This action is an attempt to assert rights which the Crown would never have thought of putting forward, and which are in no way necessary for the peace and good order of the town of Llandudno. Charges have been made against the defendant in the pleadings

(1) 5 B. & Al. 268.

COZENS-HARDY J.
1899
LLANDUDNO URBAN COUNCIL v. WOODS.

and in the evidence for which there is no justification. I cannot refuse to make a declaration that the defendant is not entitled, without the consent of the plaintiffs, to hold meetings or deliver addresses, lectures, or sermons on any part of the foreshore in lease from the Crown. But I decline to go further. I decline to grant an injunction. That is a formidable legal weapon which ought to be reserved for less trivial occasions. And I make no order as to costs.

Solicitors for plaintiffs: *Belfrage & Co.*
Solicitor for defendant: *J. Girdlestone.*

H. L. F.

COZENS-HARDY J.
1899
July 28, 29, 31; *Aug* 10.

CORNWALL *v.* HENSON.

[1898 C. 2425.]

Vendor and Purchaser—Purchase-money payable by Instalments—Repudiation by Purchaser — Right of Vendor to retain Instalments paid — Specific Performance.

The defendant in 1892 agreed with the plaintiff for the sale to the latter of land at the price of 150*l.*, of which the receipt of 40*l.* on account was acknowledged, the balance being payable by quarterly instalments of 9*l.* 3*s.* 4*d.* each. In case of default in payment of an instalment for thirty days all the unpaid instalments were to become immediately due and payable, and in default of payment the vendor was to have power to sell the land and retain the unpaid instalments with interest out of the proceeds, and was to pay the balance to the purchaser.

The plaintiff was in possession of the land for a considerable time, and, although generally in arrear with his instalments, he had in August, 1895, paid them all but one. No further payment was made, and in 1896 the plaintiff went away, the land being then of less value than the total amount of the instalments paid. The defendant, being unable to find the plaintiff, took possession of the land and advertised it for sale; but, being unable to effect a sale, he let the property in March, 1898, giving the tenant an option to purchase. After the tenant had built a house on the land the plaintiff returned, offered to pay the final instalment, and asked for a conveyance:—

Held, that the plaintiff's conduct amounted to repudiation of his contract, and that he was not entitled to specific performance, or damages, or the return of his instalments or a lien on the land.

Observations on *Palmer* v. *Temple*, (1839) 9 Ad. & E. 508.

By an agreement dated August 11, 1892, and made between the defendant of the one part and the plaintiff of the other part,

the defendant agreed to sell and the plaintiff agreed to buy 5¼ acres of land at Pitsea, in Essex, for 150*l.*

Clause 2 of the agreement was as follows: "The purchaser has already paid to the vendor the sum of 40*l.* on account of the said purchase-money of 150*l.*, and will pay the balance by equal quarterly instalments of 9*l.* 3*s.* 4*d.* each on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June in every year, the first of such quarterly payments to be made on the 25th day of December, 1892. The purchaser will also pay to the vendor with each such quarterly payment on account of principal such a further sum as shall be equivalent to interest at the rate of 3 per cent. per annum on the amount of principal remaining unpaid for the quarter then past, but if the purchaser shall make default in payment of any of such instalments of principal or interest or any part thereof for thirty days after the same shall have become due, the whole of the unpaid instalments of the said purchase-money with the interest thereon shall become immediately due and payable."

Thus far the clause was in print, but the following words were added in writing: "I agree to grant a further extension on application of the purchaser at an increase of interest as shall be determined by both parties."

The purchaser was by clause 3 to have possession as on July 1, 1892, and he was by clause 6 to make and maintain certain boundary fences and hedges, and also to complete and repair part of a certain road abutting on the land. By clause 8 the vendor, in the event of default being made for thirty days in payment of the whole of the unpaid instalments with interest, was to be at liberty to resell and to retain out of the proceeds of sale unpaid instalments with interest, and the net balance of the proceeds was to be paid by the vendor to the purchaser.

The plaintiff entered into possession and cultivated the land for a considerable time, but he did not make it pay. The plaintiff was generally in arrear with his instalments, and from time to time the defendant allowed a postponement, interest being charged and paid at 5*l.* per cent. The last instalment

COZENS-HARDY J.
1899
CORNWALL v. HENSON

paid by the plaintiff became due on June 24, 1895, and was paid with interest on August 27, 1895. This left only one instalment due; but from August, 1895, no further payment was made by the plaintiff to the defendant.

Much correspondence took place, in which the defendant called upon the plaintiff to pay, and on October 23, 1896, the plaintiff wrote a long letter to the defendant asking him to reply to a particular address in Jamaica Road, Bermondsey. Shortly after that date the plaintiff disappeared, and letters addressed by the defendant to him at Jamaica Road were returned through the Dead Letter Office. Inquiries made by the defendant at former addresses and from his relations led to no result.

The field was in a derelict state, the fences were broken down, nothing was produced by the land, the road was not made, and rates and tithe were unpaid. The land was not worth the total amount of the instalments paid by the plaintiff. Under these circumstances the defendant took possession and advertised the property for sale, and, not being able to effect a sale, he, on March 7, 1898, agreed to let the property to a Mr. Burns with liberty to erect a house, and with the option to purchase at any time during the term. Burns accordingly erected a house, and was still in possession at the trial of the action.

The plaintiff now appeared upon the scene, and expressed his pleasure at finding a house erected, and on June 13, 1898, he wrote to the defendant that he was prepared to "make the final instalment and settlement of the ground purchased." Correspondence took place, but nothing resulted from it, and on July 13, 1898, this action was commenced, the plaintiff claiming specific performance of the agreement of August, 1892, and damages instead of or in addition to specific performance, or alternatively damages for breach of contract and repayment of the purchase-money with interest.

The action was tried with witnesses before Cozens-Hardy J. on July 28, 29, 31, 1899.

Astbury, Q.C., and *Harry Greenwood*, for the plaintiff. The

defendant claims the right to keep both the land and the purchase-money, and denies that the plaintiff has any right to damages. The defendant wrongfully took possession, and the plaintiff is entitled to damages. The defendant's only right was to sell under clause 8 of the agreement; he had no power to let the land.

Frederic Thompson, for the defendant. The plaintiff cannot obtain specific performance, being unable to shew that he is and always has been ready and willing to perform his part of the bargain. Nor can he obtain damages. He has abandoned his contract, for he has acted not merely so as to break his contract, but to entitle the defendant to say that he has repudiated it and no longer stands by it, and therefore is not entitled to the return of anything which he paid on account of purchase-money: *Howe* v. *Smith*. (1)

[COZENS-HARDY J. referred to *Ex parte Barrell*. (2)]

There it was held that where a contract goes off by the purchaser's default the vendor is entitled to retain the deposit. If the plaintiff has no right to a return of his money, he has no lien. The defendant in this case acted on the repudiation and altered his position.

Astbury, *Q.C.*, in reply. Delay or other breach of contract is not necessarily repudiation: *Howe* v. *Smith*. (3) There was no abandonment here—the defendant evidently regarded the land as his own property. Although the deposit cannot always be recovered, different principles apply where money is not paid as a deposit, but as an instalment of purchase-money. What can be forfeited is what is not merely a part payment, but an earnest to bind the bargain: *Howe* v. *Smith*. (4) The money cannot be retained by the vendor because he chooses to treat something which the purchaser has done, and which is mere non-performance or neglect in performance, as repudiation. [He also referred to *Palmer* v. *Temple* (5); Fry on Specific Performance, 3rd ed. p. 484, pl. 1060.]

Cur. adv. vult.

(1) (1884) 27 Ch. D. 89, 99.
(2) (1875) L. R. 10 Ch. 512.
(3) 27 Ch. D. 95.
(4) Ibid. 101.
(5) 9 Ad. & E. 508.

COZENS-HARDY J.

1899

CORNWALL v. HENSON.

Aug. 10. COZENS-HARDY J. (after stating the facts as above set out). At an early stage it appeared to me to be reasonably clear, and it was assented to by the plaintiff's counsel, that specific performance could not be granted. The plaintiff in an action for specific performance must shew that he is and always has been ready and willing to perform his part of the bargain. It would be monstrous after such delay to grant a decree for specific performance, which would involve turning Burns out of possession, and giving the land with the house upon it to the plaintiff.

Although the plaintiff is not entitled to specific performance, it is contended that he can claim damages against the defendant. It is necessary to consider what is the legal position of the plaintiff. It is often stated that the effect of a contract for sale of land is to make the purchaser from that moment in equity owner of the land. I think, however, that this statement is too wide. The doctrine is subject to one obvious qualification—namely, that the contract is one of which the Court under the circumstances will decree specific performance. For, instance, if the vendor is not in a position to obtain a decree for specific performance, whether by reason of some defect in title or by reason of some collateral misrepresentation, the purchaser never was, in the view of the Court, owner in equity of the property. So, too, if by reason of delay or other circumstances the Court declines to grant to the purchaser specific performance, the purchaser is not treated as being in equity owner of the property.

It is settled law that, where a purchase goes off by reason of some default on the part of the vendor, the purchaser has a lien upon the property for any part of his purchase-money which has been paid: see *Rose* v. *Watson*. (1) The same principle applies where the Court declines to grant a decree for specific performance in favour of the purchaser on the ground of his delay, if there has been no part performance, and if there is not on the part of the purchaser anything which can amount to evidence of abandonment or repudiation of the contract: see *Levy* v. *Stogdon* (2), where a purchaser failed to obtain specific

(1) (1864) 10 H. L. C. 672. (2) [1898] 1 Ch. 478; [1899] 1 Ch. 5.

performance, but was nevertheless declared entitled to a lien for his deposit.

The question which I have to decide is, in the words of Cotton L.J. in *Howe* v. *Smith* (1), whether there are here "acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract." Upon the whole, I think that the plaintiff by his conduct has shewn that in October, 1896, he thought it not worth his while to have anything further to do with the land, and in fact abandoned the land and repudiated the contract. I think, further, that, the plaintiff having made such default as precluded him from demanding the transfer of the property, the defendant was justified in treating this as an abandonment, and in acting thenceforward as the true owner, both at law and in equity, of the property. It was in this character that he granted a lease to Burns with an option to purchase.

I do not think, under these circumstances, it would be right for me to give the plaintiff a lien upon the property for the money he has paid, or an order against the defendant to repay this sum: see *Dinn* v. *Grant*. (2) The defendant's rights cannot be limited to the exercise of the power of sale conferred by the contract when once it is held that the plaintiff is no longer owner in equity of the land or entitled to a lien upon it. The lease to Burns was a lawful exercise of ownership. It is, I think, plain that the plaintiff cannot obtain damages for breach of the contract which he has himself repudiated, nor do I think he can recover back the money which he has paid, as money had and received to his use. There has not been a total failure of consideration. The general rule of law is that, where a contract has been in part performed, no part of the money paid under the contract can be recovered back: see *Whincup* v. *Hughes*. (3) The plaintiff has been for a time in possession of the property under the contract, and there are no circumstances from which I can imply a promise by the

(1) 27 Ch. D. 95. (2) (1852) 5 De G. & Sm. 451.
(3) (1871) L. R. 6 C. P. 78.

COZENS-HARDY J.

1899

CORNWALL v. HENSON.

defendant to repay this money to the plaintiff, especially when the land is not now worth this money. Reliance was placed by counsel for the plaintiff on *Palmer* v. *Temple* (1); but in that case there had been no part performance of the contract, and possession had not been taken; and, moreover, it is not easy to reconcile the observations in that case with the judgment of the Court of Appeal in *Howe* v. *Smith*. (2)

I ought, perhaps, to mention that the defendant, on receipt of the plaintiff's letter of June 13, 1898, made an offer to convey subject to the rights of Burns under his tenancy, and subject to the payment of a sum of 25*l*. I regret that this offer was not accepted. But I do not think I ought to treat that offer as an admission by the defendant that the plaintiff's rights under the contract still subsisted. Except on the footing that the contract was at an end, and that the plaintiff was not owner in equity of the land, Burns's lease with the option of purchase was improper and invalid. The result is that I am not able to find any legal foundation for the plaintiff's claim for damages, or for the return of the instalments he has paid. I must, therefore, dismiss the action, but, under the circumstances, without costs.

Solicitors for plaintiff: *Edwin, Son & Edgley.*

Solicitors for defendant: *Field, Roscoe & Co., for J. H. Mitchell, Worthing.*

(1) 9 Ad. & E. 508.

(2) 27 Ch. D. 89.

F. E.

In re WHEELER'S SETTLEMENT TRUSTS. BRIGGS *v.* RYAN.

COZENS-HARDY J.

1899

Aug. 5, 8, 11.

[1899 B. 22.]

Married Woman—Separate Estate—Restraint on Anticipation—Separate Trading—Bankruptcy of Married Woman—Death of Husband—Title of Trustee in Bankruptcy—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5; *s.* 19—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 152.

Where a married woman, entitled to separate estate with a restraint on anticipation, trades separately from her husband and becomes bankrupt, her separate estate, subject to the restraint on anticipation, vests in her trustee in bankruptcy and, on the death of her husband in her lifetime, is assets for her creditors.

In such a case the restraint on anticipation is in the nature of an incumbrance which is removed by the death of the husband.

Pelton Brothers v. *Harrison* [1891] 2 Q. B. 422, discussed.

By indenture of settlement dated March 29, 1859, certain real estate in Ireland was conveyed to trustees upon trusts (in the events which happened) to pay the rents and profits thereof to Caroline R. Wheeler, spinster, for her life for her separate use without power of anticipation, and after her death upon the trusts therein mentioned.

On August 19, 1868, the said Caroline R. Wheeler was married to Albert Ryan.

In the year 1891 the said Caroline R. Ryan was carrying on the business of a school-mistress apart from her said husband, and on June 12, 1891, she was adjudicated bankrupt. Her assets did not amount to 300*l.*, and the official receiver became the trustee in bankruptcy. The bankruptcy had not been closed, and Caroline R. Ryan was still an undischarged bankrupt.

Albert Ryan died on February 12, 1899. During his life the trustees of the settlement duly paid to his wife, the said Caroline R. Ryan, the rents and profits of the settled property; but on the death of Albert Ryan the trustee in bankruptcy claimed that the rents, as from the death of Albert Ryan,

COZENS-HARDY J.

1899

WHEELER'S SETTLEMENT TRUSTS, *In re.* BRIGGS *v.* RYAN.

were payable to him. Mrs. Ryan, however, claimed that the rents were still payable to her, and the present trustee of the settlement took out an originating summons to determine the question.

Brabant, for the trustee.

Astbury, Q.C., and *W. A. Woods*, for Mrs. Ryan. Under sub-s. 5 of s. 1 of the Married Women's Property Act, 1882, a married woman does not personally become bankrupt, but only in respect of her "separate property": *Ex parte Gilchrist* (1); and by virtue of s. 19 of that Act only such separate property passes to her trustee in bankruptcy as is without restraint on anticipation: *Ex parte Boyd.* (2) Where the restraint on anticipation exists, the trustee is not entitled. There is no authority directly in point, but in the case of judgment creditors it is settled that execution can only go against the separate estate to which the married woman was entitled at the date of the contract without restraint on anticipation: *Scott* v. *Morley* (3); and, even where action is brought after the death of the husband, property settled with restraint on anticipation is not liable to satisfy the judgment: *Beckett* v. *Tasker* (4); *Pelton Brothers* v. *Harrison* (5); *Softlaw* v. *Welch.* (6) It is submitted that the same principle applies to the trustee in bankruptcy. When the husband dies, the restraint on anticipation ceases, and the property is no longer "separate estate" within the meaning of sub-s. 5 of s. 1.

[COZENS-HARDY J. referred to *Tullett* v. *Armstrong.* (7)]

Separate use is only a shield to protect the wife against the husband, and on his death it is suspended, and may revive on a second marriage. On his death it is no longer separate estate. In *Pelton Brothers* v. *Harrison* (5) Kay L.J. (8) expressly points out that "there is no such thing as separate property of an unmarried woman"; and s. 152 of the Bank-

(1) (1886) 17 Q. B. D. 521.
(2) (1888) 21 Q. B. D. 264.
(3) (1887) 20 Q. B. D. 120.
(4) (1887) 19 Q. B. D. 7.
(5) [1891] 2 Q. B. 422.
(6) [1899] 2 Q. B. 419.
(7) (1838) 1 Beav. 1; S.C. on appeal, (1840) 4 My. & Cr. 377, 390.
(8) [1891] 2 Q. B. 425.

ruptcy Act, 1883, provides that nothing in that Act shall affect the provisions of the Married Women's Property Act, 1882. If therefore the latter Act does not enlarge the rights of a judgment creditor, it does not enlarge the rights of a trustee in bankruptcy.

[They also referred to *Hood Barrs* v. *Heriot* (1) and *Holtby* v. *Hodgson*. (2)]

H. Greenwood, for the trustee in bankruptcy. The rights of a trustee in bankruptcy are greater than those of a judgment creditor. All the cases cited, except *Ex parte Boyd* (3), are cases of judgment creditors. The distinction between bankruptcy and a judgment on a contract is illustrated by the cases of *In re Lynes* (4) and *In re Handford & Co.* (5) A judgment on a contract can only be enforced in the form settled in *Scott* v. *Morley* (6), but sub-s. 5 of s. 1 of the Act enacts that a married woman trading separately from her husband shall in respect of her separate estate be subject to the bankruptcy laws as if she were a feme sole. If she had been a feme sole when she became bankrupt, then all her property, no matter where it came from, would have vested in her trustee in bankruptcy. It is submitted, therefore, that on her bankruptcy this property passed to the trustee in bankruptcy subject only to this—that during her coverture he could not touch it. The restraint on anticipation was in the nature of an incumbrance which was removed by the death of the husband. [He also referred to *Cooper* v. *Macdonald*. (7)]

Astbury, Q.C., in reply.

Cur. adv. vult.

Aug. 11. COZENS-HARDY J. The question raised by this originating summons is whether the rents and profits since the death of Mr. Ryan ought to be paid to the widow during the rest of her life, or whether they are payable to the official receiver as the trustee in bankruptcy. This depends upon the true construction and effect of s. 1, sub-s. 5, of the Married Women's

(1) [1896] A. C. 174.
(2) (1889) 24 Q. B. D. 103.
(3) 21 Q. B. D. 264.
(4) [1893] 2 Q. B. 113.
(5) [1899] 1 Q. B. 566.
(6) 20 Q. B. D. 120.
(7) (1877) 7 Ch. D. 288.

COZENS-HARDY J.

1899

WHEELER'S SETTLEMENT TRUSTS, *In re.*

BRIGGS *v.* RYAN.

Property Act, 1882, coupled with s. 19 of that Act. Sub-s. 5 is as follows: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." Now, if there were nothing else, it is reasonably clear that the entire life interest of Mrs. Ryan, notwithstanding the restraint upon anticipation, would pass to the official receiver: see *Axford* v. *Reid.* (1) That she could not by voluntary alienation affect her life interest would be of no moment. This is her separate estate, and there is no exception from the generality of the language of the statute. But then comes s. 19, which is by no means easy to interpret. It says: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors." It has been decided by the Court of Appeal that the life estate of a married woman limited to her separate use, but not subject to a restraint on anticipation, will vest in her trustee in bankrupcy notwithstanding s. 19: see *Ex parte Boyd.* (2) It is, I think, plain, and it has not been disputed, that Mrs. Ryan's bankruptcy could not interfere with or render inoperative the restraint upon anticipation. But the question remains whether the title of the trustee is or is not effective now that the restraint upon anticipation is no longer operative. It is important to

(1) (1889) 22 Q. B. D. 548. (2) 21 Q. B. D. 264.

observe that Mrs. Ryan takes nothing under the Act of 1882. She takes under the settlement of 1859, which purports to give her an interest for her separate use during the whole of her life, and subject to a restraint upon anticipation. It is common knowledge that it was and is usual to give the income of property during the whole life of a woman for her separate use, though the separate use is sometimes limited to a particular coverture, as in *Stogdon* v. *Lee*. (1) There is no difficulty in attaching a separate use either to the complete life interest, or even to an estate in fee: *Baggett* v. *Meux* (2); or to an absolute interest in personal estate: *In re Grey's Settlement*. (3) In the well-known case of *Tullett* v. *Armstrong* (4) it was finally decided that, under a limitation to a woman during her life for her separate use without power of anticipation, the separate use and also the restraint upon anticipation would become operative under and by virtue of the original limitation in the event of a second marriage. Lord Langdale treated the separate use as "suspended" and having no operation while the woman is discovert, though it is capable of arising upon the happening of a marriage: *Tullett* v. *Armstrong*. (5) Lord Cottenham expressly negatived the idea that a new separate estate arises on the second marriage, and asserts that the old separate estate continues through the second coverture. (6) There are authorities which speak of that which was separate estate being still separate estate after the husband's death: see *Pike* v. *Fitzgibbon*. (7) The judgment of Malins V.-C., as varied by the Court of Appeal, is given in Seton, 5th ed. p. 757. It declares that such of the separate property of the widow as was immediately before the death of her husband and at this present date is vested in her, excluding any separate property which during coverture she was restrained from anticipating, was chargeable with the payment of the amount due to the plaintiffs. There are also authorities which speak of that which was separate estate being still separate estate after the wife's

(1) [1891] 1 Q. B. 661.
(2) (1844) 1 Coll. 138.
(3) (1887) 34 Ch. D. 712.
(4) 1 Beav. 1; 4 My. & Cr. 390.
(5) 1 Beav. 32–3.
(6) 4 My. & Cr. 405.
(7) (1880) 14 Ch. D. 837; S.C. on appeal, (1881) 17 Ch. D. 454.

COZENS-HARDY J.

1899

WHEELER'S SETTLEMENT TRUSTS, *In re.* BRIGGS *v.* RYAN.

death: see *Heatley* v. *Thomas* (1), where the decree directed an account of the separate estate of the deceased lady against her executors; and *London Chartered Bank of Australia* v. *Lemprière* (2), where the judgment of the Privy Council was given by James L.J. I may point out that s. 23 of the Act of 1882 treats a married woman's separate estate as something which may vest in her executors: see *Surman* v. *Wharton*. (3) It seems to me to follow, from the authorities I have cited, that separate estate may be said to exist notwithstanding discoverture. It is "suspended" in this sense—that the widow's power of disposition over it is the same as if it had been given to her simply and without words creating a separate use. It is not extinct, because it becomes operative upon a second marriage. If the coverture ends by her death, it is still regarded as her separate estate, and is applied in satisfaction of her debts and liabilities. If the coverture ends by her husband's death, the same principle ought to apply. Unless, therefore, I am constrained by authority, I should hold that the combined effect of the two sections of the Act of 1882, to which I have referred, was to vest in the trustee the whole life interest of Mrs. Ryan, subject only to and except so far as it was protected by the restraint upon anticipation, and that directly the restraint upon anticipation ceased by Mr. Ryan's death, the title became free from impediment. But it has been strongly argued that I am not at liberty to take this view in consequence of the decision of the Court of Appeal in the case of *Pelton Brothers* v. *Harrison*. (4) In that case judgment had been obtained against a married woman in the form settled in *Scott* v. *Morley* (5), that is to say, "to be paid out of her separate property as hereinafter mentioned and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant not subject to any restraint upon anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution notwithstanding such restriction." The judgment in *Pelton Brothers* v. *Harrison* (4) was obtained after

(1) (1809) 15 Ves. 596.
(2) (1873) L. R. 4 P. C. 572.
(3) [1891] 1 Q. B. 491.
(4) [1891] 2 Q. B. 422.
(5) 20 Q. B. D. 120, 132.

her husband's death, but in respect of a contract entered into during coverture. The question was whether a receiver had been properly appointed of the property as to which, during coverture, she had been restrained from anticipating. The Court of Appeal held that the judgment creditor could not attach this property, and Kay L.J., in delivering the judgment of the Court, said (1): "The question is whether under this judgment the property which the married woman was restrained from anticipating can be affected. The shortest answer is that the judgment expressly directs that there shall be no execution against such property, and in my opinion it is as completely excepted from the consequences of the judgment as if it had been specifically mentioned in it, and stated to be excepted because the married woman was restrained from anticipating it." This, of course, was a sufficient ground for the decision. But the Lord Justice proceeds to discuss the Act of 1882, s. 1, sub-ss. 2, 4, and uses language (2) upon which great reliance is placed. He says: "But it is argued that when the husband died this property was still separate property, and that by the death of the husband the restraint on anticipation was gone, and it may therefore be treated as separate property acquired upon the death of the husband. The answer to this argument is, that there is no such thing as separate property of an unmarried woman. Separate property means property held separately from the husband." This case turned upon s. 1, sub-s. 2, which may be called the contract section, and not upon sub-s. 5, which is the bankruptcy section. But I have felt great difficulty in consequence of these weighty observations of Kay L.J. They were not, however, necessary to the decision of the case, and they seem to me not to be consistent with the views expressed by the Court of Appeal itself in *Pike* v. *Fitzgibbon* (3), and by other judges in many cases, to some of which I have referred. I therefore feel myself at liberty in this case to follow my own view, and to hold that the entire life interest of Mrs. Ryan was her separate property at the date of the bankruptcy within the meaning of

(1) [1891] 2 Q. B. 423–4. (2) [1891] 2 Q. B. 425.
(3) 14 Ch. D. 837; S.C. on appeal, 17 Ch. D. 454.

COZENS-HARDY J.

1899

WHEELER'S SETTLEMENT TRUSTS, *In re.* BRIGGS *v.* RYAN.

s. 1, sub-s. 5, and that the restraint upon anticipation, which is saved by s. 19, attached only to a portion of that life interest, namely, during the joint lives of herself and her husband, and that the residue of the life interest, on the death of her husband, belongs to the trustee in bankruptcy, and must be applied in satisfaction of her debts. I therefore make a declaration in conformity with this opinion. I think it is a case in which the costs of all parties, including the widow, should be paid by the plaintiff, who is the trustee of the settlement of 1859, out of the life interest to which the declaration extends.

Solicitors: *C. J. E. Crosse, Manchester; Jaques & Co., for Layton & Co., Liverpool.*

H. L. F.

In re W. BLACKBURN & CO.

WRIGHT J.

1899

July 26.

BUCKLEY'S CASE.

Company—Winding-up—Fraudulent Preference—Preference for Conscience's Sake—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

The preferential payment of a creditor of a company within the three months prior to the point which, in the case of a company is, by s. 164 of the Companies Act, 1862, equivalent to an act of bankruptcy by an individual trader, is an undue or fraudulent preference if the payment is made, not merely to discharge a legal obligation, but because the directors think that it would be a hardship on the creditor and against their conscience to leave him to his right to prove in the winding-up.

In re Fletcher, (1891) 9 Morrell, 8, and *In re Vingoe and Davies*, (1894) 1 Manson, 416, followed.

W. BLACKBURN & Co., Limited, had in January, 1899, obtained credit with its bankers and other persons, and payment was due on certain acceptances to the bankers on January 23. The company was unable to meet the acceptances and could not obtain the renewal of them.

On January 24 the directors of the company knew that it was hopelessly insolvent, and on that day they met and considered what they should do with a considerable sum of money belonging to the company which they had in their hands, and they decided to distribute the money amongst certain of the smaller creditors of the company, excluding the larger creditors from the benefit of the distribution. Amongst the creditors preferred was a firm of Edmund Buckley & Co., with whom the company had on January 13 entered into a contract for the purchase of a quantity of wool for 900*l.* at the Liverpool sales. The wool was delivered to the company on January 17, and payment for it was apparently due to the firm on January 27. The wool was not the property of the firm, but was bought from other people, and all that the firm was entitled to out of the transaction was a brokerage fee. After paying other small sums the directors had in their hands a balance of 790*l.* 19*s.* 2*d.*, consisting of customers' bills having from five to seven months to run, and at the meeting the directors decided to send the bills to the firm. The bills were

WRIGHT J. 1899 BUCKLEY'S CASE.

accordingly sent to the firm on January 25. The directors in thus preferring the firm were not moved by a desire to discharge a legal obligation, but made the preferential payment because they thought it a hardship on the firm that the firm should remain liable to the vendors for the wool while the creditors of the company obtained the benefit of the purchase. The evidence on this point is referred to in the judgment of Wright J.

On January 24, 1899, a resolution was passed by the directors to summon a meeting of the shareholders of the company to pass an extraordinary resolution for voluntary winding-up, and the extraordinary resolution was passed on February 2.

The liquidators moved before Wright J. in the voluntary winding-up for a declaration that the payment of the 790*l.* 19*s.* 2*d.* was an undue or fraudulent preference of the firm, and for an order for repayment of that sum with costs.

Herbert Reed, Q.C., and *P. F. Wheeler*, for the liquidators.

P. O. Lawrence, Q.C., and *A. J. Ashton*, for Edmund Buckley & Co. The case is very like *Bills* v. *Smith* (1), where the bankrupt had, shortly before his bankruptcy, repaid to his brother a sum which the latter had borrowed from his own bankers for the benefit of the bankrupt; and the repayment in that case was held to be valid. The payment to the creditor is good if the dominant motive of the debtor was, not to prefer the creditor, but to satisfy his own conscience: *Ex parte Taylor*. (2) That case was followed in *New, Prance & Garrard's Trustee* v. *Hunting*. (3)

[WRIGHT J. It is difficult to reconcile the case last cited with some of the observations in *Ex parte Taylor*. (2)]

It is sufficient if the debtor makes payment under an obligation which he thinks is legally binding on him: *In re Fletcher*. (4)

[WRIGHT J. referred to *In re Vingoe and Davies*. (5)]

Reed, Q.C., was not called on to reply.

(1) (1865) 34 L. J. (Q.B.) 68.
(2) (1886) 18 Q. B. D. 295, 299.
(3) [1897] 2 Q. B. 19.
(4) 9 Morrell, 8.
(5) 1 Manson, 416.

WRIGHT J. In this case the company had, on January 13, made a contract with Buckley & Co. for the delivery of the goods. The goods were delivered on the 17th. Probably on the true construction of the contract—but I do not determine that, because it is not necessary—payment was due on January 27. It may have been due before, according to Mr. Lawrence's view. On January 24 the directors were fully aware that the company was in a hopelessly insolvent condition, and on that day they met together and considered what they should do with the considerable sum of money which they had in their hands. Then the evidence is that the directors resolved to distribute that money preferentially amongst certain of the creditors of the company, leaving out the largest of them altogether; and the question is whether the preference is a fraudulent one, within the meaning of the statute.

Now, that depends, primarily at any rate, upon the state of mind of the directors when they authorized the payment, which was made by handing over to the firm of Buckley & Co. certain bills accepted by other customers. Mr. Blackburn, who is the chairman, or at any rate the principal director of the company, said, in his examination-in-chief, that the directors paid the firm because they thought it very hard on them, they being mere brokers and only getting a small commission out of the business, and yet standing to lose a large sum of about 900*l*. Then Mr. Blackburn said that he, at any rate, did not at the time of ordering the bills to be handed over to the firm know or think at all about whether the money was then due from the company to the firm. Clearly, therefore, if that is correct, the directors did not make the payment to the firm because they thought they were under any legal obligation to do it. Then what was their view in paying the money? According to Mr. Blackburn's evidence-in-chief, their dominant view, and their only view in preferring the firm, was because they thought non-payment would be hard on the firm. In cross-examination he said: "We knew we were in difficulties; we paid Buckley & Co. because I did not feel easy about the way the Buckleys had been treated by my son and secretary: the payment was made to satisfy my conscience."

WRIGHT J. 1899 BUCKLEY'S CASE.

Now, is a payment like that a fraudulent preference? I have no doubt that according to the recent authorities it is. For a long time it was almost impossible for anybody to know what a fraudulent preference was. Ever since the decision in *New, Prance & Garrard's Trustee* v. *Hunting* (1), which has since been affirmed by the House of Lords (2), so little difficulty has been felt by gentlemen who practise in bankruptcy matters, both barristers and solicitors, that questions of fraudulent preference comparatively seldom now arise. But, having regard to *New, Prance & Garrard's Trustee* v. *Hunting* (1), I do not think there is any doubt that this was a fraudulent preference, exactly because the payment was made with a view to prefer—because it was not a payment made merely for discharging a legal obligation. It was made, according to the evidence of the witness, because he thought it was hard on Buckley & Co. not to be paid, and it was in order to satisfy the director's own conscience.

In two cases to which I have referred—*In re Fletcher* (3) and *In re Vingoe and Davies* (4)—it was held, by very high authorities in these matters, that exactly what has been done in this case was a fraudulent preference—that if a debtor paid one creditor in advance of others, not from a sense of legal obligation, but from a sense of moral obligation or duty, that was a fraudulent preference; and it was so held in one of those cases by the judges who are now Williams and Collins L.JJ., and in the other by Vaughan Williams J. I entirely agree with those decisions, and I think, therefore, that the money must be paid back, however hard the case may be.

Solicitors for liquidators: *Van Sandau & Co., for Mills & Co., Huddersfield.*

Solicitors for respondents: *Wynne, Holme & Wynne, for Whitley & Co., Liverpool.*

(1) [1897] 2 Q. B. 19.
(2) Sub nom. *Sharp* v. *Jackson*, [1899] A. C. 419.
(3) 9 Morrell, 8.
(4) 1 Manson, 416.

F. E.

ECCLESIASTICAL COMMISSIONERS *v.* PINNEY.

BYRNE J.

1899

July 12, 18; Aug. 12.

[1896 E. 346.]

Vendor and Purchaser—Glebe Lands—Sale by a Vicar—Purchase by a Trustee of Settled Estate—Entry by Tenant for Life—Payment of Interest on Purchase-money—Non-payment of Principal—Successive Tenants for Life—Specific Performance—Charge on Trust Estate—Vendor's Lien.

In 1873 a vicar, with the consent of the patron of the living and the approval of the plaintiffs, entered into a contract with the trustee of a settled estate, who had power to invest in the purchase of land, for the sale of the glebe lands of the vicarage under the Ecclesiastical Leasing Acts, 1842 and 1858; the plaintiffs and the tenant for life were also parties to and executed this contract. The title was accepted, and the tenant for life, with the approval of the trustee, entered into possession and paid the vicar interest on the purchase-money, 24,963*l.*, at 3½ per cent., and this payment was continued by successive tenants for life until 1896, when, the purchase-money being still unpaid, the plaintiffs commenced the present action against the present vicar, the present tenant for life, the legal personal representative of the trustee, and the present trustees of the settled estates, for specific performance of the contract and damages, or an account and a declaration that the plaintiffs were entitled to a lien on the lands, and enforcement thereof:—

Held, that the contract was not enforceable against any person or persons subsequently becoming entitled to the estate; that the vendors were not entitled, by subrogation or otherwise, to be placed in the same position as the trustee would have been in had he personally discharged his liability on the contract, nor could they claim payment out of any assets in the hands of the trustees liable to be laid out in land or distributed in payment of portions to the relief of the settled estate; and that they were entitled to nothing more than a vendor's lien on the land sold.

ACTION.

This case has already been fully reported in [1899] 1 Ch. 99, but the following summary of the facts there stated is necessary to make this report intelligible.

By a contract of July 28, 1873, the Rev. John Digby Wingfield Digby, the then incumbent of the vicarage of Coleshill, Warwickshire, with the approval of the plaintiffs and of George Digby Wingfield Digby, the patron of the living, agreed to sell the glebe lands of the vicarage, under the powers of the Ecclesiastical Leasing Acts, 1842 and 1858, for 24,963*l.*,

BYRNE J.
1899
ECCLESIASTICAL COMMISSIONERS v. PINNEY.

to R. B. Wingfield Baker, the surviving trustee of the will of Edward Earl Digby, who had power to invest the trust funds in the purchase of land. This contract was entered into with the consent of the said George D. W. Digby, who was also tenant for life of the estates settled by the will of the said Edward Earl Digby; the plaintiffs also were parties to and executed it. This contract is fully set out in the previous report.

The title was accepted, and George D. W. Digby, as the tenant for life, with the privity and approval of R. B. Wingfield Baker, entered into possession, and paid the vicar interest on the purchase-money, first at 4*l.* per cent., and subsequently at 3¼*l.* per cent., until his death in 1883.

In 1874 the defendant John Charles Pinney became vicar of Coleshill. No part of the purchase-money was ever paid, and no conveyance of the glebe lands was ever executed, but the successive tenants for life of the settled estate, George, John, and John Kenelm D. W. Digby, had continued the payment of the interest on the purchase-money to the vicar for the time being until 1896, when, the value of the land having decreased considerably and the purchase-money being still unpaid, the plaintiffs commenced the present action against the present vicar, John Kenelm D. W. Digby, the present tenant for life, the legal personal representatives of R. B. Wingfield Baker, and the present trustees of estates settled by Edward Earl Digby's will and subsequent settlements, claiming specific performance of the contract, damages in addition to or in lieu thereof, or in the alternative an account and a declaration that they were entitled to a lien on the lands and to enforcement thereof.

The Court of Appeal having decided that it was the duty of the plaintiffs to see that the powers given by the Ecclesiastical Leasing Acts were properly applied, and that they had a good ground of action (1), remitted the action for trial to Byrne J.

The following statement of additional facts, which do not appear in the previous report, is taken from the judgment of Byrne J.

(1) [1899] 1 Ch. 99.

Under the will of Edward Earl Digby the settled estates stood limited to the use of George D. W. Digby for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of John D. W. Digby (No. 1) for life, with remainder to the use of John D. W. Digby (No. 2) for life, with remainder to the use of the first and other sons of John D. W. Digby (No. 2) in tail male, with remainder over.

By the same will the residuary personalty was given to trustees upon trust for conversion, and to invest the moneys to arise therefrom with the approbation of the tenant for life in the purchase of hereditaments in fee simple to be settled and conveyed to the same uses as the hereditaments thereby devised.

On the death of Earl Digby (the testator) on May 11, 1856, without issue, George D. W. Digby entered into possession as tenant for life of the settled estates; and in the same year certain jointure rent-charges were created and covenanted to be created, and in particular in the settlement made on the marriage of J. D. W. Digby (No. 2) in 1858 he covenanted to exercise his power of creating portions under the will of the testator in favour of younger children to the amount, in the events which happened, of 20,000*l.*

John Digby W. Digby (No. 1) died in 1878. R. B. Wingfield Baker, the trustee who entered into the contract of 1873, died on March 25, 1880, and his estate had been legally distributed many years ago after proper advertisements.

On January 27, 1881, a disentailing deed was executed, to which George D. W. Digby, John D. W. Digby (No. 2), and John Kenelm Digby (the eldest son of John D. W. Digby (No. 2)) were parties.

It appeared by the recitals to this deed that the trustees had invested in the purchase of hereditaments the greater part of the testator's residuary personal estate, and that a considerable part of the remaining part of such residuary personal estate was advanced for the purposes of a fund known as "The Digby Estate Improvement Fund," and expended generally on the improvement of the estates; and repayment of part of that sum, amounting to 158,000*l.*, was secured by the policies of assurance.

The disentailing deed operated upon all the settled estates,

BYRNE J.
1899
ECCLESIASTICAL COMMISSIONERS v. PINNEY.

including all hereditaments which by any means or in any manner were then subject at law or in equity to the uses of the will (including, therefore, the hereditaments comprised in the contract of 1873 in question), and assured them, subject and without prejudice to the uses and estates limited by the will preceding the estate in tail male or the estates tail of John Kenelm Digby, and the powers annexed or exercisable during the continuance thereof, to such uses as George D. W. Digby. John D. W. Digby (No. 2), and John K. Digby should jointly appoint. The 158,000*l.* assured by the policies, and any other moneys secured thereby, and all other sums of money subject to be laid out in the purchase of lands, were also disentailed, and assured so as to be subject to a similar power of joint appointment as the land.

By deed of resettlement dated March 23, 1882, the joint power of appointment was duly exercised, and all the settled lands were settled to uses whereunder John D. W. Digby (No. 2) and John Kenelm Digby were created successively tenants for life with remainder in strict settlement.

By deeds of assignment and resettlement of even date with the last deed, the policies for 158,000*l.* and all moneys to become payable thereunder were, subject to a certain mortgage for 30,000*l.* created in August, 1872, vested in the defendants, the trustees of the resettlement of 1882, in trust for the younger children of John D. W. Digby (No. 2) as therein mentioned, with a proviso that the sum appointed should be taken to be in satisfaction of the 20,000*l.* in the marriage settlement of John D. W. Digby (No. 2) in 1858 covenanted to be appointed, with a proviso that the receipts of the children should operate to discharge the settled estates from their proportions of this 20,000*l.*

The whole of the 158,000*l.* secured by the policies had been distributed by the defendants, the trustees of the resettlement of 1882, part of it going in the payment of the 20,000*l.* charged for the portions of younger children by the settlement of 1858.

It was admitted that no relief would be obtained against the incumbent, and he was only joined as defendant because, though one of the vendors, he declined to become co-plaintiff.

The tenant in tail of the settled estates was not made a defendant to the action, nor were the persons beneficially interested in the 158,000*l.*, all of which had been distributed years ago.

Levett, Q.C., and *Pochin*, for the plaintiffs. A valid contract was entered into in 1873 by Baker, the trustee, who was authorized by the terms of the trust to invest his trust funds in the purchase of land; this contract bound the estate: *Lysaght* v. *Edwards* (1), and is therefore enforceable against the remainderman, or any person or persons subsequently becoming entitled to the settled estate: *Mortlock* v. *Buller* (2); *Shannon* v. *Bradstreet* (3); *Dowell* v. *Dew* (4); *Morgan* v. *Milman* (5); Fry on Specific Performance, 3rd ed. p. 106, § 243; Dart's Vendors and Purchasers, 6th ed. 1117.

The purchaser, Baker, as a trustee purchasing under a power, had a right to be indemnified out of the trust estate against his personal liability under the contract, and had he actually paid the purchase-money he would have been entitled to be recouped out of the trust funds; the plaintiffs, as vendors to him, are entitled to be placed in the same position as he would have been in had he paid this purchase-money, and by subrogation can get hold of the fund out of which payment ought to have been made; there is no reason why the doctrine of subrogation, as applied to cases of executors carrying on their testator's business, should not be extended to a case like the present: *Ex parte Garland* (6); *In re Johnson* (7); *Fraser* v. *Murdoch.* (8) *Strickland* v. *Symons* (9), when carefully examined, does not differ from the authorities we rely on.

[BYRNE J. referred to *Kendall* v. *Hamilton.* (10)]

If the trustees had in their hands any assets liable to be laid out in land, the vendors can claim to be paid directly out of those assets.

Farwell, Q.C., and *R. F. Norton*, for the present tenant for

(1) (1876) 2 Ch. D. 499.
(2) (1804) 10 Ves. 292, 314.
(3) (1803) 1 Sch. & Lef. 52.
(4) (1842) 1 Y. & C. Ch. 345.
(5) (1852) 10 Hare, 279, 285.
(6) (1804) 10 Ves. 110.
(7) (1880) 15 Ch. D. 548, 552.
(8) (1881) 6 App. Cas. 855, 875.
(9) (1884) 26 Ch. D. 245.
(10) (1879) 4 App. Cas. 504, 517.

BYRNE J. 1899 ECCLESIASTICAL COMMISSIONERS v. PINNEY.

life. No direct authority has been cited which establishes the plaintiffs' contention on this last point. The alleged right to payment was only a right to stand in the shoes of the executor if the estate was insolvent; the creditor had no direct rights; insolvency had to be pleaded: *Owen* v. *Delamere*. (1) You must shew that you have exhausted all your remedies against the executor before you can get anything by subrogation.

[BYRNE J. referred to *M'Neillie* v. *Acton*. (2)]

In the present case the legal personal representatives of the trustee are under no liability. The plaintiffs cannot recover against the trust estate directly; the trust estate was not bound by the contract: *Strickland* v. *Symons* (3); the utmost the plaintiffs are entitled to is a declaration of lien as unpaid vendors: *Bishop of Winchester* v. *Mid-Hants Ry. Co.* (4)

There never was any money to pay this purchase-money. The 158,000*l.* policy money went to the younger children. The plaintiffs, by their laches in allowing this purchase-money to remain unpaid for so long, have allowed the various beneficiaries to alter and deal with their interests in the estate, and there is no money out of which the plaintiffs can be paid. The tenant in tail is not made a party, neither are the persons interested in the policy money parties: none of these persons were parties to the contract. The tenant for life has no power to mortgage the settled land to pay this claim: *Hampden* v. *Earl of Buckinghamshire*. (5)

Levett, Q.C., in reply. The contract has been treated by three successive tenants for life as a binding contract; had the present tenant for life made further inquiries he would have discovered that the purchase-money was still unpaid. The fact that the personal estate was disentailed does not affect the plaintiffs' rights; the disentail could only be made subject to the liability to provide this purchase-money. The defendant, being partly answerable for the delay, cannot avail himself of it as a defence to this claim: *Ridgway* v. *Wharton*. (6)

Part of the 158,000*l.* from the policy money was used in

(1) (1872) L. R. 15 Eq. 134.
(2) (1853) 4 D. M. & G. 744.
(3) 26 Ch. D. 245.
(4) (1867) L. R. 5 Eq. 17.
(5) [1893] 2 Ch. 531.
(6) (1856) 6 H. L. C. 238, 292.

paying off the 20,000*l.* charged for the younger children's portions, so relieving the settled estates of that sum; to this extent, therefore, the plaintiffs are entitled to stand in the place of these younger children against the estate. This 20,000*l.* is clearly traced into the estate, and the plaintiffs are entitled by subrogation to have any deficiency in the present sale value of this glebe land made good out of this sum.

Carson, for the vicar.

Brinton, for the legal personal representatives of the surviving trustee, and

Sargant, for the trustees of the settled estates, took no part in the argument.

Cur. adv. vult.

Aug. 12. BYRNE J. In this case the Court of Appeal has already held (1) that the Ecclesiastical Commissioners have a good right of action, whether they can maintain an action for specific performance in the narrow technical sense of the expression, or whether they are compelled to fall back upon their vendors' lien.

I have now heard the action upon this footing, and have to decide what relief, if any, the plaintiffs are entitled to.

It is unnecessary to recapitulate the facts as stated in the report of the case before the Court of Appeal, but I will state the terms of the contract now sought to be enforced somewhat more fully, and some additional facts necessary to render the points at issue clear.

[His Lordship having stated the terms of the contract of July 28 very fully, and the additional facts as set out above, continued :—]

I propose to deal with the case as though the plaintiffs had the same rights under the contract as ordinary vendors who have entered into a contract for the sale of land to a trustee having power to purchase under the trusts of his settlement.

Upon the execution of the contract and the purchaser being let into possession, he became the owner in equity of the land, subject to payment of the purchase-money in accordance with

(1) [1899] 1 Ch. 99.

BYRNE J. 1899 ECCLESIASTICAL COMMISSIONERS v. PINNEY.

the contract, and subject to the paramount right of the vendors to protect their own interest as vendors of the property; they had a lien upon the estate sold for the unpaid purchase-money, and a right to sue Baker personally in the event of non-payment of the purchase-money. It is, however, admitted that an action will not lie against Baker's representatives under the circumstances in respect of the personal liability of Baker to pay the purchase-money, his estate having many years since been legally distributed after proper advertisement.

Then it was contended that, inasmuch as a valid contract was entered into by the trustee donee of the power of purchase, that contract was enforceable against any person or persons becoming entitled to the estate (using that expression as meaning the settled property liable to be laid out in the purchase of land), and in support of this proposition *Mortlock* v. *Buller* (1) was relied on, and other cases in which persons becoming entitled to land, the subject of a contract for sale, have been held bound by the contract.

It appears to me that these cases have no application under the circumstances of that now before me. It is not necessary for me to decide whether or not, if a testator or settlor has specifically appropriated funds for the purchase of real estate, and while the trustee has these funds in his hands or under his control, the vendor may not be able, in the event of the bankruptcy or failure to pay on the part of the trustee, to obtain payment by means of administration proceedings or otherwise out of the fund so appropriated. This may depend upon the terms and construction of the contract and the solvency of the estate. It was originally contended broadly that, inasmuch as the purchaser was a trustee purchasing under a power, and consequently had a right of indemnity against liability under his contract out of the whole of the property subject to the trusts of the instrument creating the trust, so that having paid the purchase-money he would have been entitled to indemnity out of the whole assets, the vendors to him were entitled, in default of payment by him, to be placed in the same position as he would have been placed in had he paid the money. I

(1) 10 Ves. 292.

think it was admitted subsequently; but whether that be so or not, I am of opinion that this alleged right cannot be established against the real estate, or against the 158,000*l.* It seems to me that a complete answer is afforded by the fact that neither the tenant in tail of the settled real estate, nor the persons beneficially interested in, and who have in fact received, the 158,000*l.*, are before the Court. But, besides this, the action is not an action to compel trustees to make good a breach of trust.

Then it was urged that the doctrine of subrogation as applied in cases of executors carrying on business ought to be extended to a case like the present, and that, if it could be shewn that at any time the trustees had in their hands any assets liable to be laid out in land, the vendor ought to be held entitled to claim payment directly out of those assets, although they have been parted with. It was admitted that no authority could be cited establishing this proposition. I think that the cases referred to on this head depend upon the principle of title to indemnity by the trustees, and of subrogation to that right. But before that case can arise a right to indemnity by the trustee (in the present case on the part of the legal personal representatives of Baker) must be established. But they are under no liability, and are not entitled to indemnity; so that this contention fails.

It was finally urged that it appears that 20,000*l.*, portion of the 158,000*l.*, was applied in paying portions in 1888, so relieving the settled estate to that extent, and that the plaintiffs are therefore entitled to stand in the position of the younger children against the settled land, as at the date when the 20,000*l.* was paid, to the extent to which the property when sold will be insufficient to discharge the purchase-money.

The 20,000*l.* was a sum lawfully covenanted to be paid in a marriage settlement dated in 1858, and it was a sum lawfully paid out of funds properly applicable for the purpose. It is admitted that the distributed moneys cannot be followed, but it is said that the plaintiffs are entitled on some principle of marshalling or of subrogation, and that this gives a right against the settled land.

BYRNE J.
1899
ECCLESIASTICAL COMMISSIONERS v. PINNEY.

I may observe that this is not a case made by the pleadings: it was only raised in reply, and is not a point to which the defendant's attention or evidence was directed. But, as I have already pointed out, I have not the proper parties before me to permit of such a right being established, and I do not think it could have been established even if I had the proper parties before me.

In my judgment the plaintiffs are entitled to a vendor's lien on the land sold; and I understand that, for the purpose of enabling a declaration to be made establishing that lien, the tenant in tail is willing, by way of concession, to appear, so that he may be bound.

It is an unfortunate case, the plaintiffs having lost by reason of the misfortune of the fall in the value of land, and having been content to allow the parties interested to continue in possession without payment of the purchase-money for a long series of years upon an agreement for payment of interest at a good rate to the incumbent for the time being.

Fortunately, the plaintiffs being a public body can afford to wait for the chance of an appreciation in value, and I understand that the present tenant for life is willing to go on paying interest.

I am unable to do otherwise than hold that the plaintiffs have failed in their action.

Solicitors: *Milles, Jennings-White & Foster*; *Dawson, Bennett & Ryde*; *Hulberts, Hussey & Metcalfe.*

W. C. D.

C. A.
1899
Nov. 2.

In re TURNEY.
TURNEY *v.* TURNEY.

[1898 T. 1258.]

Will—Construction—Remoteness—Intestacy—Vesting—Maintenance.

A testator bequeathed a sum of 12,000*l.* to trustees, upon trust to pay the income thereof to a daughter during her life, and after her death to pay 1000*l.* to her husband, if then living, and subject as aforesaid, as to capital and income, on trust for all the children of the daughter when they should attain twenty-five, but not before, and, if more than one, in equal shares, and in case there should not be "any such child" the fund was to form part of his residue. The testator declared that, until the 12,000*l.* should be invested, his trustees should pay to his daughter, or, in the event of her death, to her husband and children, interest on their respective portions. The testator also declared that his trustees might at their discretion raise any part or parts (not exceeding together one moiety) of the expectant share of any grandchild under his will, and apply the same for his or her advancement, &c. And the testator empowered his trustees to apply all or any part of the income arising from the expectant share of any grandchild under his will, after the death of the preceding owner for life thereof, for the maintenance and education of each such grandchild, and he directed his trustees to invest and accumulate the unapplied income in augmentation of the capital of such share.

By a codicil the testator directed his trustees to hold a moiety of the residue of his estate, real and personal, in trust to pay the income thereof to a son during his life; and after his death for his child or children absolutely upon their attaining twenty-five. And in the event of the death of either or all the son's children before attaining twenty-five, then upon trust to pay the share of the child or children so dying to another son absolutely:—

Held, that under the gift of the 12,000*l.*, and also under the gift of a moiety of the residue, the grandchildren took immediate vested interests, subject to their being divested in case they did not attain twenty-five, and that the trusts were not void for remoteness.

Decision of Kekewich J. reversed.

Per Lindley M.R. and Sir F. H. Jeune, *Fox* v. *Fox*, (1875) L. R. 19 Eq. 286, approved.

APPEALS against a decision of Kekewich J. upon the construction of the will of George Leonard Turney and a codicil thereto.

The testator, by his will dated May 31, 1895, appointed his

C. A. 1899 TURNEY, *In re.* TURNEY *v.* TURNEY.

sons, James Neave Turney and Horace George Turney, executors and trustees thereof. He bequeathed to J. N. Turney some leasehold property. He directed his trustees within ten years from the date of his decease to invest the sum of 12,000*l.* in manner therein mentioned, and to stand possessed of the said sum and the securities for the same, upon trust to pay the annual income thereof to his daughter Jessie Anna Arnold, the wife of Charles Fearnley Arnold, during her life, for her separate use and without power of anticipation. And after her death upon trust to pay the sum of 1000*l.* unto the said Charles F. Arnold if he should then be alive, and subject as aforesaid, as to as well the capital as the annual income of the said trust fund, upon trust for all the children of his said daughter when they should attain the age of twenty-five years, but not before, whether a son or daughter, and if more than one in equal shares; and in case there should not be any such child, then he directed that the said fund should form part of the residue of his estate. And the testator declared that, until the said sum of 12,000*l.* should be invested as aforesaid or otherwise provided for, his trustees should pay to Jessie Anna Arnold, or, in the event of her decease, to her said husband and children, interest on their respective portions at the rate of 3 per cent. per annum. The testator directed his trustees within ten years from the date of his death to invest in the same way another sum of 12,000*l.* to be held upon similar trusts for the benefit of his daughter Clara Ellen Arnold, the wife of Ernest Edward Arnold, and her husband and children, with a similar trust in default of children, and a similar provision as to the payment of interest until investment.

The testator devised and bequeathed all his real and personal estate (not thereby otherwise disposed of) unto his trustees, upon trust that they should out of the income thereof pay his funeral and testamentary expenses, legacy duty, and his debts, and the legacies bequeathed by any codicil thereto, and to pay all costs, charges, and expenses that his trustees should incur in carrying into effect any of the trusts or purposes of his will, and, subject to the trust aforesaid, upon trust for the said J. N. Turney or (*sic*) H. G. Turney in equal shares absolutely.

Provided always that, if the said J. N. Turney and H. G. Turney or either of them should die in the testator's lifetime leaving a child or children who should survive him (the testator) and should attain the age of twenty-five years, then and in every such case the last-mentioned child or children should take, and if more than one equally between them, the share which his, her, or their parent would have taken of and in the said residuary trust funds if such parent had survived the testator. The testator declared that his trustees might at their own discretion raise any part or parts (not exceeding together one moiety) of the expectant share of any grandchild of his under his will and apply the same for his or her advancement, preferment, or benefit as his trustees should think fit. The testator empowered his trustees to apply all or any part of the income arising from the expectant share of any grandchild of his under his will, after the death of the preceding owner for life thereof, for the maintenance and education of each such grandchild. And he directed his trustees to invest and accumulate the unapplied income in augmentation of the capital of such share.

By a codicil dated July 21, 1895, the testator revoked the appointment of his son J. N. Turney as an executor and trustee. And he appointed his son H. G. Turney, his nephews H. J. Turney and A. T. Turney, and Louise Jewson to be executors and trustees of his will. And he revoked the absolute gift of one moiety of his residuary estate to his son James Neave contained in his will, and instead thereof he directed his trustees to hold the said moiety of his residuary real and personal estate in trust to pay the income thereof to his son James Neave during his life; and after his death upon trust for his child or children absolutely upon their attaining the age of twenty-five years. And in the event of the death of either or all the children of his son James Neave before attaining the age of twenty-five years, then upon trust to pay the share of the child or children so dying to his son Horace George absolutely. And in all other respects he confirmed his will.

The testator died on July 26, 1895. He left surviving him

C. A. 1899 TURNEY, *In re.* TURNEY *v.* TURNEY.

the four children named in his will and no others, and they were his sole statutory next of kin. J. N. Turney was his heir-at-law. J. N. Turney died on October 16, 1897, having by his will appointed A. T. Turney, H. J. Turney, and his widow Sophia Elizabeth Turney, executors and trustees thereof, and devised to them his residuary estate upon certain trusts. J. N. Turney had only two children, Leonard Turney and Elsie Turney, each of whom was an infant.

Jessie Anna Arnold had had ten children all but one of whom were infants.

Clara Ellen Arnold had had two children both of whom were infants.

H. G. Turney and Louise Jewson, two of the trustees of the testator's will, took out an originating summons to determine the true construction of the will.

The defendants to the summons were H. J. Turney and A. T. Turney, the other two trustees; Sophia Elizabeth Turney and her two infant children; Jessie Anna Arnold and Ethel Jessie Arnold, one of her infant children; and Clara Ellen Arnold and Mabel Clara Arnold, one of her infant children.

Kekewich J. held that the trusts declared by the codicil of a moiety of the testator's residuary real and personal estate after the death of his son J. N. Turney were void for remoteness, and that that moiety was undisposed of by his will, and passed to his heir-at-law and next of kin respectively. He also held that the respective trusts declared of the first-mentioned sum of 12,000*l.* after the death of Jessie A. Arnold (except the trust for the benefit of her husband), and the respective trusts declared of the secondly mentioned sum of 12,000*l.* after the death of Clara Ellen Arnold (except the trust for the benefit of her husband), were respectively void for remoteness.

The infant children of J. N. Turney appealed against the declaration as to a moiety of the testator's residuary real and personal estate.

A second appeal was presented on behalf of the defendant infant children of the two daughters of the testator against the declaration as to the two sums of 12,000*l.*

Renshaw, *Q.C.*, and *G. Henderson*, for the children of J. N. Turney. On the true construction of the codicil there is no intestacy. The interests given to the children of J. N. Turney are not void for remoteness. They take vested interests, but liable to be divested in the event of their not attaining twenty-five.

[They were stopped by the Court.]

Theobald, *Q.C.*, and *Solomon*, for the two daughters of the testator. The gift is not simply of real estate: it is of a mixed fund consisting of realty and personalty. The rule as to the vesting of real estate is very artificial, and it has not been applied to personalty: Jarman on Wills, 5th ed. vol. i. p. 809 et seq. It is not necessary that the same rule should be applied to both the realty and the personalty. But, if both are to be governed by the same rule, the rule as to personalty should be applied: *Jackson* v. *Calvert*. (1) The daughters do not desire to contest the second appeal, their interests being in conflict with those of their own children.

Bassett Hopkins (*Warrington*, *Q.C.*, with him), for the widow of J. N. Turney. The decision of Jessel M.R. in *Fox* v. *Fox* (2) will probably be relied on by the appellants. But in *In re Wintle* (3) North J. dissented from *Fox* v. *Fox* (2); and the judgment of Jessel M.R. himself in *In re Parker* (4) shews that the language which he used in *Fox* v. *Fox* (2) might be construed as going further than he really intended. The tendency of the authorities is against vesting in such a case: *Dewar* v. *Brooke* (5); *In re Ashmore's Trusts*. (6)

Hughes, *Q.C.*, and *Broomfield*, for the children of the testator's daughters. There is no intestacy as regards the two sums of 12,000*l*. The daughters' children take vested interests, though the shares are perhaps liable to be divested in case the children die before attaining twenty-five. "Such child" means a child of the daughter, not a child who shall attain twenty-five. The gift is not to the children when they shall attain twenty-five; the payment or transfer of the share only is

(1) (1860) 1 J. & H. 235.
(2) L. R. 19 Eq. 286.
(3) [1896] 2 Ch. 711.
(4) (1880) 16 Ch. D. 44.
(5) (1880) 14 Ch. D. 529.
(6) (1869) L. R. 9 Eq. 99.

C. A. 1899 TURNEY, *In re* TURNEY *v.* TURNEY.

postponed till twenty-five, but it is vested before. And in the advancement and maintenance clauses the testator speaks of the "expectant share" of a child. And he gives his trustees power to apply all or any part of the income of the "expectant share" of a child for the maintenance and education of the child. *Fox* v. *Fox* (1) is in our favour. Though North J., in *In re Wintle* (2) expressed his dissent from *Fox* v. *Fox* (1), he could not overrule it.

In re Parker (3) is consistent with *Fox* v. *Fox*. (1)

[LINDLEY M.R. referred to Theobald on Wills, 4th ed. p. 465.]

North J. misunderstood some of the cases to which he referred in *In re Wintle* (2)—for instance, *In re Grimshaw's Trusts*. (4)

Bramwell Davis, *Q.C.*, and *P. S. Stokes*, for the executors and trustees of the testator.

A. Beddall, for the trustees of the will of J. N. Turney.

Bassett Hopkins, in reply.

LINDLEY M.R. This case, of course, turns upon the language of the will and the codicil, and, in my view, the learned judge was wrong in holding that there is an intestacy either as to the share of residue or as to the two sums of 12,000*l*. The supposed intestacy is not created by any ambiguity in the language of the will; it arises from the application to the will of the rule against perpetuities. Of course, we are not at liberty to misconstrue the will in order to avoid an intestacy resulting from the application of that rule, any more than in cases in which gifts are bad under the Charitable Uses Act. We must construe the will and ascertain its meaning, and the question we have to consider is whether these gifts were vested, subject to being divested, or were vested only on the attainment of twenty-five years.

Now, neither the will nor the codicil is well drawn: their language is by no means clear or accurate, and, if I may venture upon a guess, I do not believe the draftsman knew anything

(1) L. R. 19 Eq. 286.
(2) [1896] 2 Ch. 711.
(3) 16 Ch. D. 44.
(4) (1879) 11 Ch. D. 406.

about the rule against perpetuities. If he had, he would not have used the language which he has used.

I will deal first with the gift of the moiety of residue which is the subject of the first appeal. By his will the testator gave his residue to his two sons (the word "or" obviously means "and") in equal shares absolutely. Then there is a proviso that, if the two sons or either of them should die in his lifetime leaving a child or children who should survive the testator and should attain the age of twenty-five years, then the last-mentioned child or children should take, and if more than one equally. By his codicil the testator revoked the gift of residue so far as his son J. N. Turney was concerned, and directed his trustees to hold one moiety of his residuary real and personal estate in trust to pay the income thereof to that son during his life, and "after his death upon trust for his child or children absolutely, upon their attaining the age of twenty-five years, and in the event of the death of either or all of the children of my said son before attaining the age of twenty-five years, then upon trust to pay the share of the child or children so dying" to the testator's other son absolutely.

Now, what does the testator mean by "absolutely"? Does he mean more than this—that the shares are to be paid to the son's children at twenty-five? The language is ambiguous, but the word is used for some purpose—to make something clearer than it would be without it—and my impression is that it refers rather to payment than to vesting. I do not say the wording is clear; it is not. But what to my mind removes the difficulty of holding these to be vested interests is this—that the testator treats the children of his son as having "shares," although they may die before attaining twenty-five. The words are: "in the event of the death of either or all the children of my son James Neave before attaining twenty-five, then upon trust to pay the share of the child or children so dying to my son Horace." He treats the children of James who may die under twenty-five as having "shares," which he bequeaths. Of course, it is possible to construe the words as Mr. Theobald has suggested, but I doubt whether that is the meaning of the will. Obscure as the language is, I think the

C. A. 1899 TURNEY, *In re.* TURNEY *v.* TURNEY. Lindley M.R.

preferable meaning, and that which is most in accordance with the testator's wish, is that a vested interest in the moiety is given to the children of James Neave to be paid to them at twenty-five, with a proviso that if they die under twenty-five their interest is to be divested. I think that is the preferable view; and if that is the right construction, the question of remoteness does not arise. Apart from any question of remoteness, I should say that is the true meaning. I do not see how otherwise full effect can be given to the words, "upon trust to pay the share of the child or children so dying." So much for the trust of residue.

I turn now to the two sums of 12,000*l.* given to the testator's daughters, their husbands and children. The trust of the first 12,000*l.* is "for all the children of my said daughter when they shall attain the age of twenty-five years, but not before" (I do not think anything turns upon "not before"—it only emphasises it), "whether a son or daughter, and if more than one in equal shares." Who are the legatees? Are the legatees all the children of the daughter, or are they the children of the daughter who shall live to attain twenty-five? The word "when" is not equivalent to "who." The gift is to the children of the daughter, and "when" indicates the time. The importance of that will appear presently, because the next clause is, "and in case there shall not be any such child." I think "such" means child of the daughter, not child of the daughter who shall attain twenty-five. If the word had been "who," there might have been more difficulty. "In case there shall not be any such child, then I direct that the fund shall form part of the residue." Then the testator declares "that until the sum of 12,000*l.* shall be invested or otherwise provided for, my trustees shall pay to Jessie, or in the event of her decease to her said husband and children, interest on their respective portions." Now, what does that mean? How can you work that out, unless you hold that the children take vested interests, subject to their interests being divested if they do not attain twenty-five? There is great difficulty in coming to any other conclusion if due attention is paid to the words "interest on their respective portions." I attach great importance to that phrase.

In addition to this, there is the maintenance clause, which points in the same direction. I do not attach very much importance to it; but, putting all these things together, it appears to me that the right conclusion is that the 12,000*l.* is vested in the children subject to its being divested, just as the share of residue is vested in them subject to divesting. In so holding I do not think we are straining the words of the will. It is badly drawn, and I do not say that it is not as capable of the one construction as of the other. But, if the one construction tends to carry out the testator's intention while the other defeats it, I think we ought to adopt that construction which carries it out. We shall not, I think, be misconstruing the will in order to avoid an intestacy—a thing which we have no right to do. I will say very little about the authorities; I do not think anything will be gained by considering them. I am by no means satisfied that *Fox* v. *Fox* (1) was wrongly decided. So far as I have considered it, my impression is that the decision is very good sense and very good law.

SIR F. H. JEUNE. I agree, especially in the view that, when it is possible so to construe a will as not to render a material part of it void by an application of the rule against perpetuities, it is desirable to do so. Of course, as the Master of the Rolls has said, the Court has no right to misconstrue a will with that object, but, if the language of a will is ambiguous, it is right to lean rather to a construction which will undoubtedly carry out the intention of the testator, in the sense that it will make his will effectual and not render it void by means of a doctrine from which, if he had known of it, he would certainly have desired to steer clear.

It appears to me that in this will almost every indication (I think every indication) which can be discovered in its various parts points to the interests being vested in the children. With regard to the authorities, after reading *Fox* v. *Fox* (1), it appears to me to contain a very careful review of the prior authorities, and, so far as I am able to express an opinion, I agree with the view taken by Jessel M.R. that there is to be

(1) L. R. 19 Eq. 286.

C. A. 1899 TURNEY, *In re.* TURNEY *v.* TURNEY.

gathered from the earlier cases a general rule, and that rule appears to me to be founded on good sense. So far, therefore, from thinking that *Fox* v. *Fox* (1) ought to be treated as overruled, I should be glad to think that it is established as law.

ROMER L.J. I agree that there is no intestacy in this case, and I base my opinion upon the very peculiar wording of the will and codicil. With regard to the residue, in my opinion the gift in the codicil after the death of James Neave, "upon trust for his child or children absolutely upon their attaining the age of twenty-five years," is clearly a gift to a class, and there could have been only two classes—one composed of those children who attained twenty-five, and the other including also those who did not attain that age. The gift is coupled with a provision that they were not to enter into actual indefeasible possession of their shares unless they attained twenty-five years. The expression is ambiguous. I agree that, if it stood by itself, the true construction would be that the class would include only the children who attained twenty-five. But the succeeding clause proves to my mind conclusively that the testator could not have intended that the class should be made up only of those children who attained twenty-five, for he provides that, in the event of any child dying before attaining the age of twenty-five, that child's "share" should go over—not to the other members of the class, but to a stranger. He treats the child as in possession of a share notwithstanding that he never attained twenty-five, and could not, therefore, have been a member of the class who attained that age.

Upon this codicil, therefore, I think there can be no reasonable doubt that the class referred to in the first part of the gift was the children of the son. The gift is to the class of children, the share of each member of that class being divested in case he dies under twenty-five. The shares vested in the children at the death of the testator, with a gift over of the share of each member of the class in case that member should die under twenty-five.

(1) L. R. 19 Eq. 286.

C. A.
1899
TURNEY, *In re*.
TURNEY *v.* TURNEY.

With regard to the two gifts of 12,000*l*., I think there is much more difficulty. But it is a very peculiar will, and I will only say that, for the reasons generally which have been given by the Master of the Rolls and the President, I agree that there is no intestacy as regards those two sums.

Solicitors: *Morris, Coote & Co.; Hubbard, Son & Eve; Marsden & Son.*

W. L. C.

WALTER *v.* LANE.

C. A.
1899
NORTH J.
July 14; *Aug* 10.
C. A.
Oct. 30, 31; *Nov.* 9.

[1899 W. 2282.]

Copyright—Newspaper—Reports of Public Speeches—"Author"—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18.

There is no copyright in a full and accurate report of a speech delivered in public, the words of the speaker being taken down in shorthand, and the notes being afterwards transcribed by the reporter and published in a newspaper.

The reporter is not the "author" of the report within the meaning of the Copyright Act, 1842.

Decision of North J. reversed.

But there may be copyright in a summary of a speech made by a reporter in his own language.

THIS was a motion by the proprietors of *The Times* newspaper for an interim injunction to restrain the defendant from infringing their copyright by publishing or selling a book called "Appreciations and Addresses delivered by Lord Rosebery," containing copies of some articles or reports which had been published in *The Times*, or any substantial portions thereof, or extracts therefrom. During the years 1896 and 1898 reporters on the staff of *The Times* attended and composed descriptions of meetings on various occasions, including verbatim reports of speeches delivered by Lord Rosebery. These were published in *The Times* under the titles "Lord Rosebery on Free Libraries," a speech which had been made at the opening of the Passmore Edwards Library on June 25, 1896; "Lord Rosebery and Sir Walter Besant on London," at a meeting held on December 7, 1896; "Lord Rosebery on Great Britain

C. A. 1899 WALTER v. LANE.

and America," at a lecture delivered on July 7, 1898; "Lord Rosebery on Burke," at the unveiling of a memorial on July 9, 1898; and "Etonian Dinner—Lord Rosebery and Lord Curzon," at a dinner which took place on October 28, 1898.

The defendant published a book called "Appreciations and Addresses delivered by Lord Rosebery," which contained practically verbatim copies of the reports in *The Times* of these five speeches. He admitted that he had used cuttings from *The Times*, but he alleged that the proofs of the book were corrected, with Lord Rosebery's consent, by a comparison with a book of his speeches revised by himself. This book was a collection of newspaper cuttings, and in four of the articles in question *The Times* reports had not been altered in any way.

The proprietors of *The Times* brought this action, claiming a declaration that they were entitled to the copyright of the articles or reports in question, and an injunction to restrain the defendant from further publishing any book containing copies of them. The reporters had assigned such copyright as they had to the plaintiffs. One of them (a barrister) made an affidavit, in which he stated that he had composed or assisted in composing four of the reports the subject of the action, and he added: "In the course of our duty the reporters of *The Times* have to exercise their judgment and skill so as to represent in a form fit for publication the features of the meetings, and the material parts of and the sense of the speeches made at them. This involves considerable skill and labour. Notes of the proceedings and speeches are taken in shorthand, which are afterwards carefully corrected and revised and written out, and punctuated fit for publication. This was the course of procedure in the cases of the reports" in question.

Lord Rosebery made no claim to copyright in any of the speeches, and had not taken the necessary steps to secure the copyright to himself.

The motion came on for hearing before North J. on July 14, 1899.

H. Terrell, Q.C., and *MacSwinney*, for the motion. There is no authority on the precise point, but it is settled that there is

copyright in law reports: *Butterworth* v. *Robinson* (1); *Sweet* v. *Maugham* (2); *Sweet* v. *Benning* (3); *Hodges & Smith* v. *Welsh.* (4)

[NORTH J. referred to *Abernethy* v. *Hutchinson.* (5)]

No distinction can be drawn between a report of a speech at a meeting, and a report of a case in court. Reports are literary works giving a right of copyright; they are not mechanical copies. Reporters have to exercise a great deal of literary skill in taking down and editing what is said by a speaker, and making a report of a meeting. Such work requires much more skill than making a list of names and addresses for a directory, yet that was held in *Kelly* v. *Morris* (6) to enable the compiler to assert a copyright. Printed lists of Stock Exchange prices and quotations have been held to be literature and the subject of copyright: *Exchange Telegraph Co.* v. *Gregory & Co.* (7) So also have lists of registered bills of sale: *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association.* (8) Translations into English of books in foreign languages are protected: *Wyatt* v. *Barnard* (9); Scrutton on Copyright, 3rd ed. p. 116. The work of a reporter is very similar to that of a translator; he has to take down the speech in shorthand, and then transcribe his hieroglyphics into ordinary English characters; but the principle would apply if a fast writer took down in longhand a speech delivered by a slow speaker. It is suggested that the author and composer of these reports is Lord Rosebery. No doubt the Lectures Copyright Act of 1835 (5 & 6 Will. 4, c. 65), s. 5, provides means by which he might have secured the copyright; but he has taken no steps with that object, and he has no right to multiply copies of reports made by the plaintiffs' reporters. He has "abandoned his ideas and words to the use of the public": *Caird* v. *Sime.* (10) The plaintiffs do not suggest that they could interfere with reports made at the meetings by other reporters.

(1) (1801) 5 Ves. 709.
(2) (1840) 11 Sim. 51.
(3) (1855) 16 C. B. 459.
(4) (1840) 2 Ir. Eq. Rep. 266.
(5) (1825) 3 L. J. (O.S.) (Ch.) 209; 1 H. & T. 28.
(6) (1866) L. R. 1 Eq. 697.
(7) [1896] 1 Q. B. 147, 157.
(8) (1889) 40 Ch. D. 425, 435.
(9) (1814) 3 V. & B. 77.
(10) (1887) 12 App. Cas. 326, 344.

C. A. 1899 WALTER v. LANE.

T. E. Scrutton, for the defendant. No questions are raised of ownership or registration; but the defendant submits that there is no copyright in verbatim reports of public speeches, and that he is entitled to copy those reports. Copyright can only be acquired by the author or publisher of original matter. Reporters are not authors: they simply copy from dictation. There is no difference between that and copying a document. It is clear that if Lord Rosebery had written out his speeches the reporter could not by copying the manuscripts, either before or after the speeches were delivered, obtain the copyright. Delivering a speech to a limited audience, whether admitted by payment or not, is a conditional publication, and does not give anybody a right to publish it: *Nicols* v. *Pitman*. (1) But the speeches were published unconditionally. The fact that Lord Rosebery has taken no steps under the Act of 1835 to secure the copyright gives no power to the reporters to acquire copyright. He is still the author, and could not be restrained by *The Times* from publishing his own speeches: *Cary* v. *Longman*. (2) Mere copying of what has already been published gives no copyright: *Leslie* v. *Young & Sons*. (3) The composers of these reports have only made copies of the speeches: they have not bestowed brainwork upon them within *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association*. (4)

The cases on copyright in law reports do not bear out the contention of the plaintiffs. It is nowhere stated that there is any copyright in a verbatim report of a judge's judgment, although there no doubt is copyright in the other parts of the report. *Wheaton* v. *Peters* (5), *Gray* v. *Russell* (6), *Banks* v. *Manchester* (7), and *Davidson* v. *Wheelock* (8) are American authorities for holding that there is no copyright in judgments.

The circumstances in which these speeches were delivered

(1) (1884) 26 Ch. D. 374.
(2) (1801) 1 East, 358.
(3) [1894] A. C. 335, 340.
(4) 40 Ch. D. 425, 435.
(5) (1834) 33 U. S. 591, 668.
(6) (1839) 1 Story, Circuit Ct. Rep. 11.
(7) (1888) 128 U. S. 244.
(8) (1866) 27 Federal Reporter, 61.

negative any limitation of the right of publication; they are in the same position as sermons: *Caird* v. *Sime*. (1)

Literary merit has nothing to do with copyright, but the form and the words must be original: *Walter* v. *Steinkopff*. (2)

H. Terrell, Q.C., in reply. The defendant's argument is based on a fallacy: he does not distinguish between the speeches and the reports; he assumes that these reports are mere copies of Lord Rosebery's work, that Lord Rosebery is the author, and that the copyright is in him. That cannot be so. Copyright cannot exist in an idea, unless the idea is put into words and the words reduced to writing. Copyright is the right to multiply copies of a work already published: *Jefferys* v. *Boosey* (3); and in order to be owner of the copyright the author must possess the original copy. In s. 2 of the Act of 1842 the word "book" is construed to include written matter only. Lord Rosebery is not the author of these speeches in writing. In *Abernethy* v. *Hutchinson* (4) there was no manuscript; the case turned on want of good faith, not on copyright. It is thus explained in *Nicols* v. *Pitman*. (5)

American decisions can no longer be quoted as authorities in the courts of this country: *In re Missouri Steamship Co*. (6); but the cases cited by the defendant were all based on the proposition that on grounds of public policy there ought to be no restriction on the publication of judgments; they do not apply to cases of copyright.

Cur. adv. vult.

Aug. 10. NORTH J. stated the facts, and continued:—I see from the evidence, where reports from other persons are referred to, that other reporters were present; and, therefore, I take it that these meetings were held under circumstances in which reporters were invited to attend for the purpose of publishing the speeches that they heard. If that is so, they were intended to be made public, and the case is quite different from those of *Abernethy* v. *Hutchinson* (4), *Nicols*

(1) 12 App. Cas. 326, 338.
(2) [1892] 3 Ch. 489, 495.
(3) (1854) 4 H. L. C. 815, 954.
(4) 3 L. J. (O.S.) (Ch.) 209; 1 H. & T. 28.
(5) 26 Ch. D. 374.
(6) (1889) 42 Ch. D. 321, 330.

C. A. 1899 WALTER v. LANE. North J.

v. *Pitman* (1), and *Caird* v. *Sime* (2), which were cited during the argument. The speaker himself makes no claim at all. No doubt he might possibly have had some property before publication, and it is suggested that he might have had some property after making his speeches under 5 & 6 Will. 4, c. 65; but he is not making any claim here, and the question, therefore, is not one between him and the person who makes the report. The speaker, of course, has no copyright in the matter; copyright is the right to multiply copies of some original, and there is no original here in respect of which he could have held any copyright. Then, if he has not, the question is whether the reporter has any. It is admitted before me that if the reporter has any copyright *The Times* has it in this case. All the necessary evidence on that point was given, and the only question left to me to decide was whether the reporter had a copyright in the public reports in *The Times*. Now, we must just recollect what the position of matters is. A speech is made—an oral speech—not read from writing, but made off-hand. That speech can only be heard by the persons who are the audience on the particular occasion; and the address will only linger in the minds of those persons for a longer or shorter time, and will reach no one else. It is not heard by anybody outside the room, and the only way in which it can reach anybody outside the room is by a reporter taking a note of it and the report being published. The result is that what the reporter does is to put it into a form in which it can be kept and perpetuated, and also to afford to readers who are not present on the occasion when the speech is given an opportunity of seeing what they could not see in any other way. The reporter attends and takes down the speech; he puts it into form, and it is published. As regards the publication, I refer to the last paragraph of the reporter's affidavit, in which he says: [His Lordship read the paragraph set out above, and continued:—] He is not referring to particular occasions, but that is the practice and the course of business on such occasions. Then it came out incidentally in the evidence that the reports of the different papers differ

(1) 26 Ch. D. 374. (2) 12 App. Cas. 326.

very considerably, confirming, therefore, the statement which I have just read from the affidavit, where the witness is speaking, as I understand it, of the practice of reporters generally and not of himself alone.

It was said that a reporter cannot have any copyright because he is not an author of any original published matter; and it is said that a publisher of a work which has been previously published is not himself the author of that which had been previously published. That seems to me to be rather a confusion of terms. No doubt the reporter is not the author of the speech; but the reporter is the author of the public report of the speech, and of the writing containing the speech, and that is the only thing with respect to which copyright can exist.

Some cases were cited to me (two of which were cases in England) with reference to law reports. The first is *Butterworth* v. *Robinson* (1), where the defendant had sold what was called an abridgment of cases argued and determined in the courts of law. "In support of the motion it was stated, that this work was by no means a fair abridgment; that, except in colourably leaving out some parts of the cases, such as the arguments of counsel, it was a mere copy verbatim of several of the reports of cases in the courts of law, and among them of the *Term Reports*; of which the plaintiff is proprietor; comprising, not a few cases only, but all the cases published in that work; the chronological order of the original work being artfully changed to an alphabetical arrangement under heads and titles to give it the appearance of a new work." Then the Lord Chancellor says: "I have looked at one or two cases, with which I am pretty well acquainted; and it appears to me an extremely illiberal publication. Take the injunction upon the certificate of the bill filed; to give them an opportunity of stating what they can upon it." It was not brought before the Court again. That clearly was a case in which the report of what the reporter heard in court was treated as a matter in respect of which he had copyright. No doubt to some extent a legal report might be an abridgment; but it is rather singular that

(1) 5 Ves. 709.

C. A. 1899 WALTER v. LANE. North J.

what in particular might have been abridged and put very neatly—the speeches and arguments of counsel—seems to have been left out altogether. Still, there was something left in respect of which it was held that there was copyright. Again, in *Sweet* v. *Maugham* (1), the *Legal Observer* had taken cases identical with reports in the *Jurist*. Some of the cases had come from an independent source, and as to those there could be no copyright in the plaintiffs; but as to the rest the copyright was claimed, and the Vice-Chancellor granted an injunction. He said: "The injunction, as it is now expressed, does not extend to the reports which have been taken from a common source; but to those only which have been copied from the *Jurist*, and which are the plaintiff's copyright. As it is quite plain that an injury has been done by the defendants, I shall continue the injunction." There were two or three other cases of the same sort cited, but I do not think I need refer to those. Mr. Scrutton cited several American cases which, he said, shewed that the Courts in America, at any rate, had not recognised that there could be any copyright in the public judgments given by the members of the Court. That may be so. I will consider the application of those cases when I have to decide a similar case in England. I do not think the question of the judgments has anything to do with it; but in those cases it was quite clear that the learned judges recognised the right to copyright in what is taken down and put into shape and published by the reporter. In *Gray* v. *Russell* (2) an explanation was given by Story J., when it was admitted that Mr. Wheaton, the plaintiff in *Wheaton* v. *Peters* (3), had a copyright in the abstract of the arguments and in the head-notes, though possibly not in the judgment itself. Then it was said there could be no copyright in what was a mere copy, and another American case was cited—*Davidson* v. *Wheelock* (4)—in which it was stated that there was no copyright in a publication of statutes, though if there had been a compilation of them there might be a copyright. I do not quite see how there can be a copyright in a mere publishing of

(1) 11 Sim. 51, 53.
(2) 1 Story, Circuit Ct. Rep. 11.
(3) 33 U. S. 591.
(4) 27 Federal Reporter, 61.

what has already been published and printed by the Houses of Parliament in England or Congress in America. Then another case was cited—*Leslie* v. *Young & Sons* (1)—and it is instructive. There the parties had taken and published certain time-tables and information in connection with Perth. The time-tables and the times for the trains to start were, of course, taken both by the plaintiff and the respondents from the tables issued to the public by the railway companies. As to this, it was held that, as far as the plaintiff had only taken the contents of the time-tables from the public time-tables, he could not by printing them over again have any copyright in them. But he had done more. He had also collected information, and given various excursions which were recommended to travellers, and, in the report of that case in the House of Lords (1), it is pointed out why the distinction is drawn. Lord Herschell L.C. says (2): "The information in these time-tables was of course derived by the pursuer from sources which were as open to the defenders as to himself, and he does not and cannot claim any right to the information as such; he can only claim copyright in them, if they are the result in some respect or other of independent work on his part, and if advantage has been substantially taken by the defenders of that independent labour." Then a little further on he says: "The real truth is, that although it is not to be disputed that there may be copyright in a compilation or abstract involving independent labour, yet when you come to such a subject-matter as that with which we are dealing, it ought to be clearly established that, looking at these tables as a whole, there has been a substantial appropriation by the one party of the independent labour of the other, before any proceeding on the ground of copyright can be justified." Then he went on to deal with the second part of the case, and said: "It appears to me the only part of the work which can be said to indicate any considerable amount of independent labour, and be entitled to be regarded as an original work." Then he referred to certain points contained in the information as to excursions and so on, and then he says: "It seems to me that this was a compilation containing

(1) [1894] A. C. 335. (2) [1894] A. C. 340–2.

C. A. 1899 WALTER v. LANE. North J.

an abridgment of information of a very useful character, and such as was likely to be taken advantage of by those who were travelling in the neighbourhood of Perth." Therefore, that was a case where the common material did not itself give a right of copyright, but when it was made the basis of giving to the public something that was not found in the tables themselves, it was held that it might do so. In the case before me there is, as I say, no copy at all; reporting is the taking down what is spoken, and that seems to me for this purpose to be an original work and not a copy.

Then it is said that there might be a dozen reporters who would all do the same thing, and I was asked whether they could all have a copyright. On this it is rather singular that here it appears incidentally that the reports differ a good deal, and I do not see why each person should not have copyright, not in the speech, but in the version of the speech which he has made. Take the case of a translation. Mr. Terrell suggested that in this case converting the words of the speaker into a shorthand note, and then extending the shorthand into long-hand, was itself a translation. I do not follow that, and I do not use the word "translation" in that sense. You may have several translations of one work; it often happens that you have, and one might ask how many different translations there are of Dante's "Inferno," for instance. In every translation each person uses his own head and brains and time, and he produces a result which may be more or less like the result produced by others. In cases of merely prose translations they often come pretty close to one another. In cases of the turning of a poem in a foreign language into English poetry, of course there is far more room for divergence; but as regards the position of a translation, Story J., in *Emerson* v. *Davies* (1), says this: "A man has a right to a copyright in a translation, upon which he has bestowed his time and labour. To be sure, another man has an equal right to translate the original work, and to publish his translation; but then it must be his own translation by his own skill and labour; and not the mere use and publication of the translation already made by another."

(1) (1845) 3 Story, Circuit Ct. Rep. 768, 780.

Then there was a case of *Wyatt* v. *Barnard* (1), where the plaintiff published a book called "The Repertory of Arts, Manufacture, and Agriculture." He claimed the copyright in the work containing specifications of patents, translations from foreign languages, original communications, and so on. "The defendants were the publishers of another periodical work called the *Tradesman, or Commercial Magazine*, which contained various articles, copied, abstracted, or taken from the plaintiff's work without his consent, being translations from the French and German languages, and specifications of patents." The defendant set up a custom of trade which the Lord Chancellor disposed of. Then he pointed out: "As to the specifications of patents, a person who chose to go to the office, copy a specification, and publish it, could not by so doing acquire a right to restrain another from copying it"—very much like the time-tables—"and that with respect to the translations, if original, whether made by the plaintiff or given to him, they could not be distinguished from other works. The injunction therefore must go." I do not look upon newspaper reports as translations, but they are in pari materia with translations. Different persons may go to the common source and make their own translations or take their own notes, and there is no reason why there should not be a copyright in them when the requirements of law as to obtaining copyright have been duly performed. Then there was another case which I think is analogous—a case of a directory. There the materials were within a very narrow limit. There was a good deal of trouble in getting them, and a good deal of labour and expense; but what might be got was common to all, and it was so narrow in form that it would be very difficult for one person to get it in a shape different from the shape in which it was got by another. It is quite clear that one man may publish a directory, and another man may publish another, but he must not take it from the first. He must have recourse to the means which the first man adopted, and he may then make a second of his own. The point as to the directory is put very clearly by Lord Hatherley, when Vice-Chancellor, in *Kelly* v. *Morris*. (2)

(1) 3 V. & B. 77.

(2) L. R. 1 Eq. 697, 701.

C. A. 1899 WALTER v. LANE. North J.

He says: "The defendant has been most completely mistaken in what he assumes to be his right to deal with the labour and property of others. In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the milestones for himself. In the case of a map of a newly discovered island (the illustration put by Mr. Daniel), he must go through the whole process of triangulation just as if he had never seen any former map, and, generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained." So, applying the principle of those cases here, it seems to me that a reporter may make a report of a speech, delivered in public and intended to be reported, and then may have a copyright in his own publication if he procures the material himself, but he must not set to work by taking the report that another man has made and insert it in his work, simply copying that report. Then a question was put as rather bringing the argument to a reductio ad absurdum. Could *The Times* restrain Lord Rosebery from publishing his own speeches taken from the report in *The Times*? With great deference to the learned counsel, I do not quite see where the absurdity comes in. In the particular case put, if the speaker recollects what took place, of course he can publish it again either orally or in writing, and, what is more, he may for that purpose, if he likes, refresh his memory as to what took place by looking at the report in the newspapers; and if he has forgotten what took place, and if he cannot recollect sufficiently to publish the speech, there is another thing open to him—he may then go to other persons who have been present and try to get some help as to what actually took place from them. But if he cannot recollect what took place himself, and if he cannot get his memory

refreshed by materials furnished by other persons to him, I do not see where the hardship is, if the speech has been thrown to the winds without being recorded in any way by him or his friends, if, to republish that, he has to get a copy of it from a person who has made a report, to the copyright of which he is entitled. I do not think the difficulty would ever arise practically, but it is put rather as bringing the matter to an absurdity, and I do not see that it does so. It seems to me, all the legal requirements having been duly satisfied, and *The Times* having established the right to whatever copyright the reporters have, that the reporters have a copyright, and that it is now vested in *The Times*. That being so, I think the plaintiffs are entitled to the injunction as asked, omitting the words "or extracts therefrom."

H. C. R.

C. A. 1899 WALTER v. LANE. North J.

The defendant appealed. The appeal came on for hearing on October 30, 1899.

C. A.

It was agreed that the appeal should be treated as an appeal against a judgment at the trial of the action, there being no dispute as to the facts.

Birrell, Q.C., and *T. E. Scrutton*, for the defendant. The onus is on the plaintiffs to shew that they have a copyright in so much of that which appeared in *The Times* as purports to reproduce the words spoken by Lord Rosebery. The defendant has not taken the other parts of the articles. The copyright must be claimed under s. 18 of the Copyright Act, 1842. (1)

(1) By s. 2, "in the construction of this Act the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published; . . . . the word 'copyright' shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied."

By s. 3, "The copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication

C. A. 1899 WALTER v. LANE.

It is a "literary" copyright, as the preamble of the Act shews. It has been held that newspapers come within s. 18, but there is no copyright in mere news. It is said that the reporter is the "author" of the report—that it is his "composition." If there is a copyright, it would exist for forty-two years, or during his life and seven years afterwards. And for twenty-eight years the plaintiffs could not publish the reports separately without his consent. If there be such a copyright, a speaker could not publish his own speech unless he had a

---

of such book, the copyright shall in that case endure for such period of forty-two years . . . ."

Sect. 18: "When any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act; except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act; Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article or portion separately or singly without the consent previously obtained of the author thereof, or his assigns; Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

written record of his own. And, if twenty reporters were present and each made a report of the speech, there would be twenty distinct copyrights.

A reporter is not in any sense within the meaning of the Act the "author" of his report. No doubt the making of the report requires skill, knowledge, and education, but it is submitted that it requires nothing of such a character as to constitute the reporter an "author." There must be some originality, and this may be difficult to define. But the decided cases shew that independent labour, research, originality is necessary. Can this be predicated of a man who takes down in writing—shorthand or longhand—the words which he hears uttered, and then transcribes them in a form fit for publication?

[ROMER L.J. Would not the reports made by different skilled shorthand writers of the same speech differ?]

No doubt they might. The reports of great speakers, such as Pitt and Burke, convey the impression that they give the very words used by the speakers. On the other hand, the reports of such a speaker as C. J. Fox evidently do not give his own words. In the latter case there might be a copyright, but not in the former. The originality, the wit, the humour in the speech is Lord Rosebery's; none of those qualities which constitute the merit of the speech can be attributed to the reporter. His endeavour is only to present the speech to the public as it was actually delivered. His work is little more than mechanical, though no doubt it requires great skill and education. But it is not literary skill. Transcription, however intelligent it may be, cannot confer copyright. No doubt the reporter does something more than merely transcribe; he corrects evident errors, and he punctuates. But it is impossible to say whether the mistakes which he corrects are his own or those of the speaker. These speeches were well-considered literary productions; they were not like speeches delivered in the heat of debate. In *Caird* v. *Sime* (1), in which it was held that a lecturer was entitled to restrain the publication of his lectures, the lectures were delivered under

(1) 12 App. Cas. 326, 338.

C. A. 1899 WALTER v. LANE.

circumstances which implied a condition that they were not given to the public. This was also the ground of the decision in *Nicols* v. *Pitman*. (1) Lord Rosebery's speeches were evidently given to the public. This claim to copyright is entirely novel. North J. relied mainly upon *Kelly* v. *Morris* (2), but that is quite distinguishable. Going through a street and inquiring at every house in it the names of the persons residing there does involve independent labour and research. This is very different from taking down a speech in shorthand and transcribing the notes. The reporter merely echoed Lord Rosebery's words. No doubt the labour and skill exercised by a reporter differ much in the case of different speakers, but in no case are they such as to constitute the reporter an "author." The cases as to law reports are also distinguishable. In *Sweet* v. *Benning* (3) only the head-note had been copied. That was clearly an original production.

There is no decision in England as to copyright in reports of judgments of the Court, though there are American cases which decide that there is no copyright in such reports.

In the case of an illustrated trade catalogue it has been held that there is copyright in the drawings: *Maple & Co.* v. *Junior Army and Navy Stores*. (4) But in the preparation of such a catalogue much independent labour is involved. So also as to railway time-tables—*Leslie* v. *Young & Sons* (5)—it was held that there could not be copyright in a copy in substance of railway time-tables, some of the stations being omitted, while there would be copyright in an abridgment, in connection with circular tours of a particular locality, because it was the result of independent labour. There is nothing of that kind in a verbatim report of a speech. In *Exchange Telegraph Co.* v. *Gregory & Co.* (6), lists of prices on the Stock Exchange were protected, but the ground of the decision was that there had been fraud on the part of the defendants. Cases as to reports of a cricket match differ entirely from the present case, for there the reporter is recording in his own words what he himself sees

(1) 26 Ch. D. 374.
(2) L. R. 1 Eq. 697.
(3) 16 C. B. 459.
(4) (1882) 21 Ch. D. 369.
(5) [1894] A. C. 335.
(6) [1896] 1 Q. B. 147.

with his eyes. The work of a reporter who makes a verbatim report of a speech is to such an extent purely mechanical that he cannot be regarded as an independent author. His work in taking down the speech is not in principle different from the record made by such an instrument as a phonograph. There is not that originality which gives copyright under the Act: *Walter* v. *Steinkopff*. (1) In all previous cases the person who has been held entitled to copyright has done much more than the reporter has done here. If the decision of North J. is right, Lord Rosebery has not given his speeches to the public, but has conferred a series of copyrights on the individual reporters. Lord Rosebery's speech amounts in fact to a prior publication of the words of his speech, and this prevents the reporter from acquiring a copyright in them. Prior publication may be oral: *Boucicault* v. *Chatterton* (2); *Caird* v. *Sime*. (3) As Lord Rosebery took none of the steps by which he might have secured to himself the copyright of his speech, his delivery of it at a public meeting was an unconditional publication, and that is a prior publication. If the audience had been admitted by payment, there would not have been an unconditional publication. If Lord Rosebery had secured the copyright, would the report have been so far original as to prevent its being an infringement of his copyright: *Wilkins* v. *Aikin*? (4) If the plaintiffs are right, they would have been entitled to copyright in their reports even if Lord Rosebery had secured the copyright of his speeches to himself; the originality would have been exactly the same. The mere labour of copying words which already exist does not constitute originality. Lord Rosebery was the author of the literary composition. In *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association* (5) it was held that lists of registered bills of sale were entitled to copyright, but there are dicta in the judgments (6) which tend to shew that in the present case there is not sufficient originality to support copyright. In

(1) [1892] 3 Ch. 489.
(2) (1876) 5 Ch. D. 267.
(3) 12 App. Cas. 344.
(4) (1810) 17 Ves. 422.
(5) 40 Ch. D. 425.
(6) Ibid. 435.

C. A. 1899 WALTER v. LANE.

Alexander v. *Mackenzie* (1) a distinction was taken between copies of statutory forms and forms independently prepared, it being held that the latter kind of forms were entitled to copyright. This illustrates the necessity of independent labour. The present case is an attempt to reduce the amount of originality necessary to secure copyright to little or nothing. The plaintiffs' reports are not original; the words had been originally published by Lord Rosebery and given to the world.

H. Terrell, Q.C., and *MacSwinney*, for the plaintiffs. The distinction is important between copyright in a speech and copyright in a report of a speech. It is the latter copyright which the plaintiffs claim. If Lord Rosebery had taken the necessary steps to secure the copyright of his speeches, he and he alone would have had the right to make and print copies of them, and in that case the plaintiffs could not have published their independent report, because they could not do so without infringing his copyright. But he has not taken those steps, and the conversion of the speech into the report involves mental labour, which gives the report merit of a literary kind, and entitles it to copyright under the Act. If the author of a poem were to recite it to a friend without imposing any limitation upon him, and the friend took the poem down in writing and published it, he, as the author of the written record, would have copyright in it. It would be otherwise if the utterance was made under such circumstances as implied an intention not to make the poem public. The same principle applies to a speech. If Lord Rosebery had written his speech, and had read it or repeated it from memory, there would be no copyright in the report, because it would be a mere copy of an existing document. The question is whether the person who claims copyright is the "author" of that for which he claims it. If it be necessary that he should have expended labour upon it of a literary kind, a reporter does that: his work requires great skill. Copyright is the right of multiplying copies of a written or printed document. In the compilation of a directory there is little more than mechanical skill. Nor is there much more

(1) (1847) 9 D. 748.

in making a list of registered bills of sale. The reporter is the "composer" of the report. The differences in the reports of one speech made by different reporters shew that literary skill is involved. Any labour not purely mechanical is enough. It is always a question of degree. The reporter's work involves the application of intelligence and an educated mind. There is more mental labour than in the case of a directory. The present case is covered by the observations of Lord Auchinleck in *Hinton* v. *Donaldson* (1), where, speaking of sermons delivered extempore and taken down in writing by a person who heard them, he said: "Had the preacher any property in these sermons? He could have none in writing; for he never had written himself. Could he have said, that they were only intended for his own congregation, and were not to be communicated to others? I apprehend the proprietor of these was the person who wrote; for the author was not able to repeat what was in the copy."

To obtain copyright whether mechanical or mental means have been employed in the production of the work is immaterial. Copyright is purely the creation of statute: the statute makes no reference to mental or physical effort. Every "sheet of letterpress" is a "book," and the person claiming copyright must be the author of the "book," not of the ideas or language of it. For a person to be an "author" within the meaning of the statute, originality of ideas is not required, nor is it necessary that he should be the author of the language used: the essential point is that he should be the original producer of the sheet of letterpress, as in the case of a sheet of advertisements: *Lamb* v. *Evans*. (2) So in the case of a man who makes and produces a chart from the verbal description of an explorer, or of a man who hears a new piece of music and afterwards writes it out from memory and adapts it for the piano or any other instrument, and produces that adaptation. In both cases he is the "author." The measure or quality of the skill of the producer in any case is not dealt with by the Copyright Act. The question in all cases is, Who is the first person to produce the written document? The "author" of reports of speeches is

(1) (1773) 5 Pat. 509, n. (2) [1893] 1 Ch. 218.

C. A. 1899 WALTER v. LANE.

not the person who makes the speeches, but the person who first reduces them into writing, though, if he writes for or on behalf of another person, the Act gives the copyright to that other person. In *Abernethy* v. *Hutchinson* (1) Dr. Abernethy was not the "author" of his lectures, nor had he the copyright in them; but the Court restrained the publication of them by the student who reduced them into writing, on the ground that the publication was a breach of faith—a breach of an implied contract not to publish. So in *Caird* v. *Sime.* (2) Law reports have been protected in four instances: *Sweet* v. *Benning* (3); *Hodges & Smith* v. *Welsh* (4); *Butterworth* v. *Robinson* (5); *Sweet* v. *Maugham.* (6) Further, the following publications have been held entitled to protection—lists of registered bills of sale: *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association* (7); an address directory: *Kelly* v. *Morris* (8); tape prices on the Stock Exchange: *Exchange Telegraph Co.* v. *Gregory & Co.* (9); an arrangement of a pianoforte score from an operatic score: *Wood* v. *Boosey* (10); and reports of sermons: *Hinton* v. *Donaldson.* (11) There is no statement to be found in any of the authorities that it is necessary that there should be anything approaching to literary skill or merit in the person who claims to be the "author" of a work. All that is necessary is that he should have expended independent labour, time, skill, and money on the work he produces. Here the defendant has not done so: his so-called "work" is nothing more than a "paste and scissors" production. The essentials to constitute a reporter an "author" within the Act are—(1.) preliminary skill and training; (2.) mental agility and rapidity; (3.) transcription, though this may be merely mechanical; and (4.) editing, which is certainly not mechanical. It is the reporter who puts the words of a speaker into shape, edits them, and gives them to the world. If the appellants' contention is right, an inaccurate

(1) 3 L. J. (O.S.) (Ch.) 209; 1 H. & T. 28.
(2) 12 App. Cas. 326.
(3) 16 C. B. 459.
(4) 2 Ir. Eq. Rep. 266.
(5) 5 Ves. 709.
(6) 11 Sim. 51.
(7) 40 Ch. D. 425.
(8) L. R. 1 Eq. 697.
(9) [1896] 1 Q. B. 147.
(10) (1868) L. R. 3 Q. B. 223, 229.
(11) 5 Pat. 509, n.; note to *Caird* v. *Sime*, 12 App. Cas. 334.

or incomplete version or summary of a speech, made by the reporter in his own words, would be the subject of copyright, while a full and accurate report would not. This would be an absurd result. No doubt the word "author" in the statute is ambiguous; but in considering its meaning the Court should lean in favour rather of a person who has expended time, skill, and money in the production of a work, than of a person who is nothing more than a pirate.

Birrell, Q.C., in reply. Possibly there may be copyright in the work of a reporter who publishes a condensed report, giving the sense and effect of a speech with his own choice of words. That may be a composition; but here the reporter performed the merely mechanical operation of taking down the precise words used by the speaker. As to the necessity of the reporter having preliminary skill and training, the same may be said, though in a lesser degree, of a mere copyist. It is submitted that neither transcribing nor copying can make a man an "author" within the Act. Authorship involves some literary work—that is, comparing sentences and words—but it does not apply to a verbatim report. The work here, so far as it is a composition, is not the work of the reporter: it is "the work of the brain and the composition of" Lord Rosebery: *Lamb* v. *Evans*. (1)

Cur. adv. vult.

Nov. 9. LINDLEY M.R. read the judgment of the Court (Lindley M.R., Sir F. H. Jeune, and Romer L.J.), in which (after stating the facts) he continued:—The case turns on the true construction of the Copyright Act of 1842. That Act defines "copyright" and "book" (by s. 2), and confers copyright on every "author" of a book and his assigns (by s. 3). Periodical publications are dealt with in s. 18. The Act contains no definition of "author," but it confers copyright on the authors of books first published in this country. There can be no copyright in what is not published in a book; but it does not follow that the first person who publishes a book acquires a copyright in it. The meaning of the word "author" as used in the Act must be gathered from its own language and the

(1) [1892] 3 Ch. 462, 467.

C. A. 1899 WALTER v. LANE.

decisions upon it. The word occurs constantly throughout the Act, but nowhere is it used in the sense of a mere reporter or publisher of another man's verbal utterances. It is plain that a person who is not the author of a work may nevertheless be the proprietor of the copyright in it; for example, in the ordinary case of an assignment of copyright. The author is one person, the proprietor of the copyright is another. The expression "proprietor of copyright" constantly occurs in the Act. Sometimes the expression clearly includes author; sometimes it as clearly does not, but means his assign. The latter part of s. 3, which relates to the publication of books after the death of their authors, shews that authors and first publishers are by no means synonymous expressions. Again, s. 16, which relates to actions for infringement and objections to the title of the plaintiff, shews that authors and first publishers may stand on different footings. The wording of these sections justifies the view that the owner of an unpublished manuscript, although not the author of it, acquires copyright in it by first publishing it. That has been decided in Scotland, and the cases are referred to in Phillips on Copyright, pp. 55 and 56. He refers to *Maclean* v. *Moody* (1) and *Dodsley* v. *M'Farquhar*. (2) The author of an unpublished manuscript has no copyright in it, but he has a right to acquire copyright in it; and this right he may impliedly transfer to any one to whom he sells or gives the manuscript. Further, an author who sells or gives away an unpublished manuscript composition of his own may be fairly inferred to transfer his own right to publish it, unless he expressly or impliedly prohibits the publication of the manuscript which he sells or gives. This is intelligible, but it does not carry the plaintiffs far enough. A thief or other unlawful possessor of an unpublished manuscript would not acquire copyright in it by first publishing it. He would not be the author or proprietor of the manuscript. Again, Lord Rosebery had no copyright in his speech, and although he could have acquired copyright in it by putting it into writing, and printing and publishing it, he did not do so; and there is no evidence whatever to justify the inference that

(1) (1858) 20 D. 1154. (2) (1775) Mor. Dict. 8308.

he transferred to the plaintiffs his right to acquire the copyright in his own compositions, whether written or verbal. The plaintiffs do not derive their title to their publication from Lord Rosebery. Sect. 18 of the Act refers to copyright in what is printed in newspapers and periodical publications. Unless otherwise agreed, the copyright in such matter belongs to the author. But the publisher or proprietor of the newspaper, &c., can himself obtain the copyright in any article published in the newspaper, &c., if he employs some one to "compose" what is published on the terms that the copyright shall belong to the publisher or proprietor. The word "compose" here cannot mean copy or write from dictation; it obviously means compose in the sense of being the author of the matter published. This is made perfectly clear by the language of the provisos, which prevent the publisher or proprietor of the newspaper, &c., from publishing the article in a separate form without the consent of the "author," and entitle the author to publish it himself in a separate form. The "author" here is the person employed to "compose" the article. The more closely the Act is studied the more clearly it appears that, in order that the first publisher of any composition may acquire the copyright in it, he must be the "author" of what he publishes, or he must derive his right to publish from the author by being the owner of his manuscript, or in some other way.

It was contended, and North J. took the view that, although the reporter had no copyright in the speech, he was entitled to copyright in his report of it. But we cannot follow this. The report and the speech reported are, no doubt, different things, but the printer or publisher of the report is not the "author" of the speech reported, which is the only thing which gives any value or interest to the report. The printer or reporter of a speech is not the "author" of the reported speech in any intelligible sense of the word "author." To hold that every reporter of a speech has copyright in his own report would be to stretch the Copyright Act to an extent which its language will not bear, and which the Legislature obviously never contemplated. The Act was passed to protect authors, not reporters. Moreover, although it may be that reporters and their employers

C. A. 1899 WALTER v. LANE.

ought to be protected from the unauthorized appropriation of their labours by others, it by no means follows that Parliament would place reporters and their employers on the same footing as authors. It is only by treating reporters as authors of what they report—which they clearly are not—that they can be brought within the existing Copyright Act. Although we have no sympathy with the defendant, we are quite unable to decide in favour of the plaintiffs. Plausible as are the arguments addressed to the Court on their behalf, those arguments are all based on the untenable doctrine that, for the purposes of copyright, reporters are authors. The analogy of directories, road-books, maps, &c., is, in our opinion, wholly misleading. There, each man who himself makes a directory, &c., and publishes it is the author of what he publishes. The reporter of a speech is not. The distinction is all-important, but it is only by wholly ignoring it that the decisions on directories, &c., can be invoked by the plaintiffs. If the reporter of a speech gives the substance of it in his own language; if, although the ideas are not his, his expression of them is his own and not the speaker's, with immaterial differences, the reported speech would be an original composition, of which the reporter would be the author, and he would be entitled to copyright in his own production. This is the ground on which copyright in law reports is based. They are by no means mere transcripts of judgments delivered in court. But we have not to deal with speeches recast by the reporter. He has reproduced to the best of his ability not only the ideas expressed by the speaker, but the language in which the speaker expressed those ideas. In other words, we are dealing with the most accurate report of the speaker's words which the reporter could make. No doubt it requires considerable education and ability to make a good report of any speech. But an accurate report is not an original composition, nor is the reporter of a speech the author of what he reports. The appeal must be allowed, and the action dismissed with costs here and below.

Solicitors: *Upton, Atkey & Co.*; *Soames, Edwards & Jones.*

W. L. C.

In re NATIONAL STORES, LIMITED.

WRIGHT J.

1899

Oct. 25; *Nov.* 1.

[00155 of 1898.]

Company—Winding-up—Public Examination—Time for applying to Discharge Order—Disputing Finding in Official Receiver's Further Report—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8—*Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15.

A person applying to discharge an order for his public examination must come with reasonable promptitude, and a delay of two months is unreasonable. But *quære*, whether he is bound to apply within fourteen days after service of the order upon him.

A finding in the official receiver's further report under s. 8 of the Act of 1890 that a person has taken part in the promotion or formation of the company cannot be contradicted by that person by evidence.

A COMPULSORY winding-up order having been made on June 17, 1898, against the National Stores, Limited, the official receiver on May 4, 1899, made his further report, under s. 8 of the Companies (Winding-up) Act, 1890. At the conclusion of the report there was the following statement: "The official receiver is of opinion that fraud has been committed in the promotion or formation of the company by the respective persons named in the schedule hereto." In the schedule, F. G. Willett and J. W. Taylor were, amongst other persons, named as "persons who took part in the promotion."

This report was filed on May 8, 1899, on which day an order in chambers was made by Wright J., on the ex parte summons of the official receiver, for the public examination of Willett, Taylor, and others.

On May 17 the official receiver sent to Willett and Taylor the usual written notice that the order had been made, and that they would receive notice of the time and place appointed for holding the examination when the same had been fixed, and on May 26 they were served by registered post with a copy of the order for public examination.

The examination was first fixed for June 7, and was adjourned to July 17, and was further adjourned to August 7,

WRIGHT J. 1899 NATIONAL STORES, LIMITED, *In re.*

and notice was given to Willett and Taylor of these times having been fixed.

On July 17 counsel on behalf of Willett and Taylor attended the public examination and cross-examined one of the other persons named in the order of May 8, 1899.

On July 26 and 27 Willett and Taylor served summonses on the official receiver, asking that the orders for their public examination might be discharged. In Willett's case the ground of the application was stated in the summons to be that the order, so far as it affected him, was made in excess of the jurisdiction of the Court, as Willett was not (according to the summons) a person who took part in the promotion or formation of the company, as erroneously stated in the schedule to the order. Both Willett and Taylor filed affidavits in support of their applications, stating certain matters with the view of shewing that they had not taken part in the promotion of the company.

When the summons came before the registrar on August 2, he directed it to be heard before the judge in court on a day after August 7.

M. Muir Mackenzie, for Willett.

Ingle Joyce, for the official receiver. There is a preliminary objection to both applications—that they are out of time. Under the Judicature Acts and Rules there is no express limit of time for applying to a judge of the Chancery Division to discharge an order made by himself in chambers. But there are several authorities, one of which is *In re Giles* (1), shewing that the application must be made within the time limited by the Rules for bringing an appeal from an interlocutory order to the Court of Appeal. That time was formerly twenty-one days under the Rules of the Supreme Court, Order LVIII., r. 15, but is now fourteen days only under the Rules of November, 1893. The point with reference to moving to discharge an order for public examination was raised, but not decided, in *In re Civil, Naval and Military Outfitters.* (2) [He also referred to the Annual Practice (1900), pp. 790, 830.]

(1) (1890) 43 Ch. D. 391. (2) [1899] 1 Ch. 215.

Muir Mackenzie. The alleged rule of practice was only one usually adopted for the sake of convenience. But it was never intended that the judges of the Chancery Division should under all circumstances limit the time for moving to discharge orders: per Cotton L.J. in *Dickson* v. *Harrison*. (1) There is in each case a discretion, and the time may always be extended. It has not been the practice to apply the twenty-one or fourteen days' rule to applications to discharge orders for public examination: See *In re Great Kruger Gold Mining Co.* (2) [He also referred on this point to *In re Johnson*. (3)]

The objection that the applicant never took part in the promotion or formation of the company, and cannot therefore be publicly examined, involves an objection to the jurisdiction of the Court, and evidence may be adduced contradicting the statement in the official receiver's report that the applicant took part in the formation or promotion: *In re New Travellers' Chambers*. (4) [He also referred to Buckley on Companies, 7th ed. p. 684.]

John O'Connor, for Taylor.

Ingle Joyce, for the official receiver, was not called upon.

WRIGHT J. It seems to me that the application cannot be assented to. First of all, as regards the time at which this application is made, it seems to me that Mr. Willett is too late. He did not take out this summons till two months after he had been served with the order for his public examination, and during that time—certainly towards the end of it—he was represented at the examination of other persons who had been also ordered to be examined by learned counsel who took part in the proceedings and cross-examined the witnesses; so that it is impossible for Mr. Willett to say that his attention was not pointedly called to the whole subject-matter. No special ground of any sort is shewn for allowing an extension of time, and I do not think that I ought to do it in a case of this sort. What the time is I need not attempt to decide. The consensus of authority in the text-books which have received authority in daily

(1) (1878) 9 Ch. D. 243, 249.
(2) [1892] 3 Ch. 307.
(3) (1889) 42 Ch. D. 505.
(4) [1895] 1 Ch. 395.

WRIGHT J. 1899 NATIONAL STORES, LIMITED, *In re.*

practice appears to be that the time, which was formerly twenty-one days, is now fourteen days. I suppose that period runs from the time when the person ordered to be examined is served with the order; but at any rate the applicant ought to come with reasonable promptitude.

Then on the merits I am not at all sure that I was right to hear the statements which Mr. Muir Mackenzie has made for Mr. Willett. One is always anxious to hear statements of that kind if they can be allowed. Mr. Muir Mackenzie rightly admits that on the face of it the report in this case is quite sufficient to justify the making of the report and to justify the order upon it. It is sought now to shew by affidavit that Mr. Willett did not take the part which the official receiver has reported he did take in the promotion of the company, and it is said that that evidence ought to be admitted because it is an objection going to the jurisdiction of the Court to make the order, and that, according to the judgment of Romer J. in *In re New Travellers' Chambers* (1), if the Court has gone beyond its jurisdiction the party aggrieved can apply to set it right; but I do not think that this is an objection to the jurisdiction in any sense. The question whether the person named did take part, as reported by the official receiver, in the promotion or formation of the company is one of the very things which it is the object of the examination to ascertain.

It seems to me impossible to hold that there is no jurisdiction to order that the true facts as to whether the applicant did take part in the promotion or formation of the company shall be ascertained if the official receiver has made a proper finding in his report on that point; and, as I understand it, that is the view which is taken in the very passages in Mr. Buckley's book to which Mr. Muir Mackenzie referred, because the language there is: "To give the Court jurisdiction to proceed under subsect. 3 it is essential . . . . (D) That that individual is, in the words of sub-s. 3, one who 'has taken part in the promotion or formation of the company,' i.e."—and this is Mr. Buckley's language—"who, according to the findings of the report, is 'reported to have taken' such part, or who 'has been a director

(1) [1895] 1 Ch. 395.

or officer of the company.'" So that I think, even if these statements were authoritative as to the meaning of the section, they do not help, but are rather against, the contention that Mr. Muir Mackenzie has put forward. I think, therefore, that the applications must be dismissed.

Solicitors for Willett: *S. A. Clench & Co.*
Solicitors for Taylor: *Tottenham & Co.*
Solicitor for official receiver: *Solicitor to the Board of Trade.*

F. E.

END OF VOL. II.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 2, 1899, will be as follows :—

In the First Series,
[1899] 1 Ch. [1899] 2 Ch.

In the Second Series,
[1899] 1 Q. B. [1899] 2 Q. B. [1899] P.

In the Third Series,
[1899] A. C.

INDEX.

ABSOLUTE GIFT—Subject to executory limitation — Reversionary interest — Conversion—Enjoyment in specie - 336
See WILL. 2.

ACCOUNT—Banking account—Appropriation of payments—Application of rule in *Clayton's Case* - - - - 556
See BANKER.

ACKNOWLEDGMENT — Debt — Part payment by receiver—Inference of promise to pay —Statute of Limitations - - 107
See MORTGAGE. 1.

ADMINISTRATION—Costs of Severance—Trustees—Allowance of two counsel—Taxation - - - - - 588
See TRUSTEE.

—— Executor—Absolute gift subject to executory limitation—Reversionary interest—conversion—Enjoyment in specie. - 336
See WILL. 2.

ADMISSION — Of plaintiff's claim — Payment into court—Denial of liability—Satisfaction—Striking out counter-claim 93
See PRACTICE. 3.

AFFIDAVIT — Insufficiency — Evidence—Interlocutory motion—Information and belief
See PRACTICE. 2. 50

AFTER-ACQUIRED PROPERTY—Covenant to settle wife's—Infant wife—Ratification —Rectification - - - 569
See SETTLEMENT. 1.

ANTICIPATION—Restraint on—Bankruptcy of married woman — Separate estate — Death of husband—Title of trustee in bankruptcy - - - 717
See HUSBAND AND WIFE. 2.

APPEAL—As to costs—Trustee—"Costs, charges and expenses"—Discretion of judge
See PRACTICE. 1. 467

—— Hearing before two judges - - 679
See SETTLED LAND. 2.

APPOINTMENT — Execution—No reference to limited power—Intention - 536
See POWER.

APPORTIONMENT—Acreage or value—Grant or reservation — Eviction of grantee from part of land - - - 199
See RENT-CHARGE.

—— Paving, &c., expenses—Street—Alteration of scheme — Notice—Justices—Discretion - - - - - 603
See LOCAL GOVERNMENT. 2.

APPROPRIATION — Payments — Banking account—Application of rule in *Clayton's Case* - - - - 556
See BANKER.

ARBITRATION — Award—Time for making—Arbitrators "called on to act"—Notice to appoint umpire - - - 80
See COMPANY. 11.

ASSIGNMENT—Default of vendor in obtaining lessor's consent — Loss of bargain — Damages - - - - 320
See VENDOR AND PURCHASER. 1.

AUCTION—Deposit—Cheque for—Custom—Refusal to accept highest bidder - 73
See VENDOR AND PURCHASER. 2.

"AUTHOR"—Reports of public speeches—Newspaper - - - - 749
See COPYRIGHT.

AWARD—Time for making—Arbitrators "called on to act"—Notice to appoint umpire
See COMPANY. 11. 80

BANKER—*Banking Account—Appropriation of Payments—Application of Rule in Clayton's Case.*

T. & Co., stockbrokers, had two accounts with their bankers—an ordinary current account and a loan account: on the latter account 7500*l.* was owing on December 30, 1895, against which were deposited securities belonging in fact to certain

BANKER—*continued.*

of their clients. On January 11, 1896, T. & Co. paid to the credit of their current account a sum of 790*l.* 4*s.* 6*d.*, which they had received from P. for investment. On January 13 T. & Co. were declared defaulters on the Stock Exchange, and on January 24 they were adjudicated bankrupt. On January 20 the bankers closed T. & Co.'s current account, and transferred the balance, 1362*l.* 10*s.*, which included the 790*l.* 4*s.* 6*d.* received from P., and which had not been invested, to a new account in their books which may be called the "liquidation account," and proceeded to realize the securities deposited with them as above mentioned, by the sale of which the whole of the 7500*l.* owing to them on the loan account was satisfied by January 30, as appeared from the entries in the "liquidation account," leaving a small balance in their hands.

P. claimed to be repaid the sum of 790*l.* 4*s.* 6*d.* out of the 1362*l.* 10*s.*, the balance on the current account transferred to the liquidation account:—

Held, that, the bankers having appropriated specific receipts to payment of a specific balance due from the customer, the rule in *Clayton's Case*, (1816) 1 Mer. 572, 585, did not apply, and that there did not exist any equity entitling the cestuis que trust of the deposited securities as against P. to require the application of the rule, and that P. was therefore entitled to be paid out of the 1362*l.* 10*s.*

The rule in *Clayton's Case* applies where there is one unbroken account, and it applies as between cestuis que trust in an appropriate case: *In re Hallett's Estate*, (1880) 13 Ch. D. 696; *In re Stenning*, [1895] 2 Ch. 433. MUTTON *v.* PEAT - - - - Byrne J. 556

BANKRUPTCY—Fraudulent preference—Preference for conscience's sake - 725
See COMPANY. 14.

—— Married woman—Separate estate—Restraint on anticipation—Death of husband—Title of trustee in bankruptcy - 717
See HUSBAND AND WIFE. 2.

—— Proof—Provable debt—Costs—Unliquidated damages - - - - 7
See COMPANY. 17.

BOND—Interest on—Loan to husband—Bond by husband—Statute of Limitations 561
See HUSBAND AND WIFE. 3.

BRIEF—Instructions for—Costs—Trial of issue of fact before judge—Originating summons - - - - 599
See COMPANY. 13.

BUILDING SOCIETY—*New Rules—Known Insolvency at Time of Passing—Ultra Vires—Transfer of Properties to Members in Exchange for Shares—Payment of Interest on Shares.*

A rule conferring special powers of realization and of compromising and settling claims may be rightly passed by a building society after known and recognised insolvency, so long as the rule does not of necessity involve altering the constitutional rights of its members inter se or the rights of creditors, inasmuch as it may be exercised so as to be advantageous to all members alike.

If, however, such a rule is so exercised as to

BUILDING SOCIETY—*continued.*

give unfair or undue advantage to individuals, this will be a breach of trust.

A building society under its rules issued three classes of shares—A, B, and C. Of these the C shares were preferential, the holders being entitled to be paid interest in lieu of bonus and other periodical payments. In October, 1889, the society passed a rule that after December 31, 1890, no further advances should be made upon shares then existing, and that from and after the passing of the rule the withdrawal of shares (other than C shares) by priority of notice should cease, and that the funds of the society should be applied, amongst other things, to the payment of capital and interest on the C shares.

On October 28, 1891, the society passed the following rule: "In order to facilitate the realization of any properties now or at any time in the possession of the society, the directors shall have power to sell the same or any part thereof to any member, and receive in payment, either wholly or in part, any fully paid or subscription shares held by the member, whether under notice of withdrawal or not, provided that such shares shall be taken subject to the deduction of any withdrawal fee in force for the time being."

At the time of passing the rule of October, 1889, and thenceforward, the society was known both to its officers and members to be insolvent in the sense that the assets of the society were not sufficient to repay in full the sums due to members on their shares, but there were no outside creditors.

The directors having acted in pursuance of the above rule of October, 1891:—

Held, in an action commenced against them as having acted ultra vires, that the rule of October, 1891, was not ultra vires, and that the directors were not liable for a breach of trust, and, further, that the payment of interest on the C. shares was in accordance with the contract notwithstanding that the society was insolvent. SIXTH WEST KENT MUTUAL BUILDING SOCIETY *v.* HILLS - - - - Byrne J. 60

2. —— *New Rules — Known Insolvency at Time of Passing—Ultra Vires—Notice of Withdrawal—Priority.*

The Court declared that the C shares in the society, in respect of which notice of withdrawal was not given before the change of rules, were preferential as regards payment of interest only, and not as regards capital, but that the holders of C shares who gave notice to withdraw prior to the change of rules were entitled to be preferred over the holders of shares who had not then given such notice, and that the new rule was invalid in so far as it varied any then subsisting rights of members.

In re Sunderland 36th Universal Building Society, (1890) 24 Q. B. D. 394, followed. SIXTH WEST KENT MUTUAL BUILDING SOCIETY *v.* SHOVE Stirling J. 64, n.

CALLS—Special agreement as to calls—Subscribers to memorandum of association
See COMPANY. 1. 302

CASES:—*Ainley* v. *Kirkheaton Local Board*, (1891) 60 L. J. (Ch.) 734, followed 378
See Local Government. 1.
—— *Amos* v. *Smith*, (1862) 1 H. & C. 238, discussed 561
See Husband and Wife. 3.
—— *Attorney-General* v. *Acton Local Board*, (1882) 22 Ch. D. 221, followed 378
See Local Government. 1.
—— —— v. *Clerkenwell Vestry*, [1891] 3 Ch. 527, followed 378
See Local Government. 1.
—— *Bain* v. *Fothergill*, (1874) L. R. 7 H. L. 158, considered 320
See Vendor and Purchaser. 1.
—— *Betty, In re*, [1899] 1 Ch. 821, followed 54
See Tenant for Life. 2.
—— *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307, followed 474
See Mortgage. 2.
—— *Blundell* v. *Catterall*, (1821) 5 B. & Al. 268, followed 705
See Seashore.
—— *Bonafous* v. *Rybot*, (1763) 3 Burr. 1370, discussed 561
See Husband and Wife. 3.
—— *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, referred to 73
See Vendor and Purchaser. 2.
—— *Castle Bytham* (*Vicar of*), *Ex parte*, [1895] 1 Ch. 348, approved and adopted 138
See Settled Land. 1.
—— *Charles* v. *Finchley Local Board*, (1883) 25 Ch. D. 767, dissented from on one point 378
See Local Government. 1.
—— —— v. *Jones*, (1886) 33 Ch. D. 80, partly followed and partly not followed 467
See Practice. 1.
—— *Chennell, In re*, (1878) 8 Ch. D. 492, not followed 467
See Practice. 1.
—— *City of Manchester, The*, (1880) 5 P. D. 221, followed 467
See Practice. 1.
—— *Clayton's Case*, (1816) 1 Mer. 572, 585, rule in, inapplicable 556
See Banker.
—— *Coolgardie Consolidated Gold Mines, In re*, (1898) 14 Times L. R. 277, distinguished 370
See Company. 10.
—— *Cooper* v. *Cooper*, (1888) 13 App. Cas. 88, distinguished 569
See Settlement. 1.
—— *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, referred to 149
See Charity.
—— —— distinguished 184
See Trade Union. 1.
—— *Dudden* v. *Clutton Union* (*Guardians of*), (1857) 1 H. & N. 627, followed 360
See Riparian Owner. 2.
—— *Dunn* v. *Flood*, (1883) 25 Ch. D. 629, dictum in, followed 540
See Vendor and Purchaser. 7.

CASES—*continued*.
—— *Edwards* v. *Carter*, [1893] A. C. 360, followed 569
See Settlement. 1.
—— *Elsner and McArthur's Case*, [1895] 2 Ch. 759, followed 370
See Company. 10.
—— *Erlanger* v. *New Sombrero Phosphate Co.*, (1878) 3 App. Cas. 1218, discussed 392
See Company. 8.
—— *Farquhar* v. *Morris*, (1797) 7 T. R. 124, discussed 561
See Husband and Wife. 3.
—— *Fletcher, In re*, (1891) 9 Morrell, 8, followed 725
See Company. 14.
—— *Fox* v. *Fox*, (1875) L. R. 19 Eq. 286, approved 739
See Will. 3.
—— *Frost* (*S.*) *& Co., In re*, [1899] 2 Ch. 207, discussed 509
See Company. 2.
—— *Glasgow* (*Lord Provost and Magistrates of*) v. *Farie*, (1888) 13 App. Cas. 657, explained 190
See Mine. 1.
—— *Hallett's Estate, In re*, (1880) 13 Ch. D. 696, referred to 556
See Banker.
—— *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202, principle in, applied 173
See Conflict of Laws.
—— *Harman and Uxbridge and Rickmansworth Ry. Co., In re*, (1883) 24 Ch. D. 720, distinguished 340
See Vendor and Purchaser. 5.
—— *Hawes, In re*, (1892) 41 W. R. 173, discussed 561
See Husband and Wife. 3.
—— *Hext* v. *Gill*, (1872) L. R. 7 Ch. 699, explained 190
See Mine. 1.
—— *Hope's Settlement, In re*, [1899] 2 Ch. 691, n., approved of 679
See Settled Land. 2.
—— *Howe* v. *Dartmouth* (*Earl of*), (1802) 1 W. & T. 7th ed. p. 68, explained 336
See Will. 2.
—— *Huguenin* v. *Baseley*, (1807) 14 Ves. 273, distinguished 578
See Settlement. 2.
—— *Jackson & Co., In re*, [1899] 1 Ch. 348, distinguished 370
See Company. 10.
—— *Jacobs* v. *Crédit Lyonnais*, (1884) 12 Q. B. D. 589, principle in, applied 173
See Conflict of Laws.
—— *James* v. *Buena Ventura Nitrate Grounds Syndicate*, [1896] 1 Ch. 456, applicable 40
See Company. 6.
—— *Jersey* (*Earl of*) v. *Neath Union*, (1889) 22 Q. B. D. 555, explained 190
See Mine. 1.
—— *London, Brighton and South Coast Ry. Co.* v. *Truman*, (1885) 11 App. Cas. 45, distinguished 217
See Support.

CASES—*continued.*

—— *McKewan's Case*, (1877) 6 Ch. D. 447, distinguished - - - - 593
See COMPANY. 12.

—— *Macleay, In re*, (1875) L. R. 20 Eq. 186, dictum in, followed - - 540
See VENDOR AND PURCHASER. 7.

—— *Malcomson* v. *O'Dea*, (1863) 10 H. L. C. 593, principle in, applied - - 121
See EVIDENCE.

—— *Martin* v. *Price*, [1894] 1 Ch. 276, referred to - - - - - 217
See SUPPORT.

—— *Maxwell's Case*, (1874) L. R. 20 Eq. 585, distinguished - - - 593
See COMPANY. 12.

—— *Maynards, In re*, [1898] 1 Ch. 515, dissented from - - - - - 207
See COMPANY. 4.

—— *Missouri Steamship Co., In re*, (1889) 42 Ch. D. 321, principle in, applied - 173
See CONFLICT OF LAWS.

—— *Nedby* v. *Nedby*, (1852) 5 De G. & Sm. 377, followed - - - - 578
See SETTLEMENT. 2.

—— *New Zealand Gold Extraction Co.* v. *Peacock*, [1894] 1 Q. B. 622, applicable - 40
See COMPANY. 6.

—— *Nicholl* v. *Eberhardt Co.*, (1889) 61 L. T. 489; 1 Megone, 402, not followed 616
See COMPANY. 9.

—— *Palmer* v. *Temple*, (1839) 9 Ad. & E. 508, observed upon - - - 710
See VENDOR AND PURCHASER. 4.

—— *Papendick* v. *Bridgwater*, (1855) 5 E. & B. 166, distinguished - - - 121
See EVIDENCE.

—— *Pelton Brothers* v. *Harrison*, [1891] 2 Q. B. 422, discussed - - - 717
See HUSBAND AND WIFE. 2.

—— *Popplewell* v. *Hodkinson*, (1869) L. R. 4 Ex. 248, not applicable - - 217
See SUPPORT.

—— *Ratcliffe* v. *Barnard*, (1871) L. R. 6 Ch. 652, 654, observed upon - - 264
See MORTGAGE. 4.

—— *Salomon* v. *Salomon & Co.*, [1897] A. C. 22, discussed - - - - 392
See COMPANY. 8.

—— *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, referred to 217
See SUPPORT.

—— *Smith* v. *Lucas*, (1881) 18 Ch. D. 531, not followed - - - - 569
See SETTLEMENT. 1.

—— *Spickernell* v. *Hotham*, (1854) Kay, 669, 673, discussed - - - - 561
See HUSBAND AND WIFE. 3.

—— *Spiller* v. *Maude*, (1881) 32 Ch. D. 158, n., not overruled by *Cunnack* v. *Edwards*, [1896] 2 Ch. 679 - - - 149
See CHARITY.

—— *Stenning, In re*, [1895] 2 Ch. 433, referred to
See BANKER 556

CASES—*continued.*

—— *Stone* v. *Stone*, (1869) L. R. 5 Ch. 74, discussed - - - - 561
See HUSBAND AND WIFE. 3.

—— *Sunderland 36th Universal Building Society, In re*, (1890) 24 Q. B. D. 394, followed
See BUILDING SOCIETY. 2. 64, n.

—— *Thackwray and Young's Contract, In re*, (1888) 40 Ch. D. 34, followed - 540
See VENDOR AND PURCHASER. 7.

—— *Tomlinson, In re*, [1898] 1 Ch. 232, not followed - - - - 54
See TENANT FOR LIFE. 2.

—— *Turquand* v. *Marshall*, (1869) L. R. 4 Ch. 376, distinguished - - 629
See COMPANY. 7.

—— *Van Grutten* v. *Digby*, (1862) 31 Beav. 561, followed - - - - 569
See SETTLEMENT. 1.

—— *Vingoe and Davies, In re*, (1894) 1 Manson, 416, followed - - - 725
See COMPANY. 14.

—— *Warlow* v. *Harrison*, (1858) 1 E. & E. 295, 317, referred to - - - 73
See VENDOR AND PURCHASER. 2.

CHARGE—"All my real and personal estate"—Uncertainty—Public policy—Validity
See MORTGAGE. 3. 530

CHARITY—*Mortmain Act—Will—Gift to Charity—Freeholds and Leaseholds—Possession by Executor—Executor not Express Trustee for Next of Kin—Title of Heir-at-Law and Next of Kin barred by Statute of Limitations—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57)—*Executors Act*, 1830 (11 *Geo.* 4 *and* 1 *Will* 4, *c.* 40)—*Law of Property Amendment Act*, 1860 (23 & 24 *Vict. c.* 38), *s.* 13.

Spiller v. *Maude*, (1881) 32 Ch. D. 158, n., in which it was held that the Royal General Theatrical Fund Association is a charity, was not overruled or intended to be overruled by *Cunnack* v. *Edwards*, [1896] 2 Ch. 679.

The trusteeship of executors created by the Executors Act, 1830, was not intended to be different in its nature from that which existed previously under the rule established in courts of equity—namely, that in the absence of special circumstances executors were not to be regarded as express trustees.

A testator, who died in 1873, gave all his property charged with certain annuities to the trustees of a charity, and appointed K. to be his executor and gave him a legacy. The estate included freehold and leasehold property. K. entered into possession, and received the income of the testator's estate on behalf of the charity for a period of twenty years. Soon after the testator's death he read over the will to the testator's only son, who was his heir-at-law and sole next of kin, but gave him no information as to his rights under the will, having regard to the gift being to a charity. The son died in 1895 without ever having claimed the estate. In an action by the trustees of the charity for a declaration who was entitled to the testator's estate:—

Held, (1) that the gift to the charity failed under the Mortmain Act so far as the testator's

CHARITY—*continued.*
property consisted of reality or impure personalty; (2) that K. was not an express trustee for the next of kin, and that the title of the heir-at-law to the freeholds and of the next of kin to the leaseholds was barred by statute. *In re* Lacy. Royal General Theatrical Fund Association *v.* Kydd - - **Stirling J. 149**

CHEQUE—For deposit — Custom — Refusal to accept highest bidder. - - **73**
See Vendor and Purchaser. 2.

CLASS—Gift to—Lapse—Survivorship — Period of distribution - - - **314**
See Will. 1.

COAL—Reservation from grant — Redrock and coal neither having any commercial value—Injunction - - - **190**
See Mine. 1.

COMPANY—*Calls—Special Agreement as to Calls—Shareholder — Subscribers to Memorandum of Association—Action on behalf of all Shareholders—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 23—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 24, *sub-s.* 1.

Although the subscribers to a company's memorandum of association become on its incorporation members of the company in respect of the shares set opposite their names in the memorandum, they are not, in the absence of a special agreement, liable to pay anything on the shares except in respect of calls made in the manner provided by the articles. And where the articles provide that the directors may make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid and in the time of payment of such calls the directors may agree with the subscribers of the memorandum who are also directors that nothing shall on allotment be paid on the shares set opposite their names in the memorandum, although payments on allotment are required from other shareholders. Alexander *v.* Automatic Telephone Company **Cozens-Hardy J. 302**

2. —— *Contract—Filed Contract—Nature of Consideration—Statement—Sufficiency—Shares—Mode of Payment—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).

A statement of the mere form or character of the consideration of a contract filed under s. 25 of the Companies Act, 1867—e.g., the sale to the company of property the general nature of which does not appear on the face of the contract—is not a sufficient statement of the "nature of the consideration" within the rule of *In re S. Frost & Co.*, [1899] 2 Ch. 207. *In re* Robert Watson & Co. - - - - **Kekewich J. 509**

3. —— *Contract—Filed Contract—Sufficiency of—Shares issued as Fully Paid—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

The object of s. 25 of the Companies Act, 1867, is to have it shewn what shares are not to be paid for in cash, and the nature of the consideration other than cash which is to be given, but not to compel disclosure of the agreement in all its details.

On December 6, 1894, a written agreement was made between a syndicate and H., as trustee for an intended company, whereby it was agreed that the vendors should sell, and the company should purchase, a property called Millwood, in the Cape Colony, which was fully described, and that as consideration for the sale H., as the trustee for the intended company, should on or before December 15 allot to the vendors, or, as they might direct, 22,500 fully paid shares of 10*s.* each in the intended company, and should also allot to the vendors, or as they might direct, 277,493 shares of 10*s.* each in the intended company upon each of which 8*s.* should be deemed to have been paid. This agreement was never filed with the Registrar of Joint Stock Companies. The company was registered on December 6, 1894, and on December 11 the directors resolved to adopt the agreement. On December 12 an agreement in writing was made between the syndicate (called the vendors) and the company which provided that the company would forthwith allot to the vendors, or their nominee or nominees, 22,500 fully paid shares of 10*s.* each in the company, and should allot to the vendors, or as they might direct, 277,493 shares of 10*s.* each in the company upon each of which 8*s.* should be deemed to have been paid "as mentioned in an agreement dated December 6, 1894. In consideration of the allotment of such shares as aforesaid the vendors will forthwith thereafter give to the company possession of the premises more particularly mentioned in the said agreement. In all other respects the said agreement is hereby confirmed." On December 19, 1894, another agreement in writing was made between the company and the syndicate, which provided that, in consideration of the syndicate agreeing to give the company immediate possession of "the lands and premises situate in the mining district of Millwood, in the Cape Colony, more particularly mentioned and referred to in an agreement dated December 6, 1894, made between the syndicate and H., as trustee for the company," the company should forthwith allot to the syndicate, or to their nominee or nominees, 22,500 fully paid shares of 10*s.* each in the company, and for all purposes the said shares should be deemed fully paid shares in the company. The syndicate should with all possible expedition procure the lands and premises to become vested in the company free from all incumbrances. Both the contracts of December 12 and December 19 were filed with the Registrar of Joint Stock Companies—the first on December 13 and the second on December 28. On January 2, 1895, 1406 shares of 10*s.* each were allotted and issued as fully paid to Markham and Darter respectively as nominees of the syndicate. The company being in liquidation:—

Held, that the filed contract of December 19 was a sufficient compliance with the requirements of s. 25 of the Companies Act, 1867, or that at any rate the two contracts of December 12 and December 19 were sufficient.

Decision of Wright J., [1899] 1 Ch. 414, affirmed. *In re* African Gold Concessions and Development Company. Markham and Darter's Case. - - - **C. A. 480**

COMPANY—*continued.*

4. —— *Contract—Issue of fully paid-up Shares—Registered Contract—Sufficiency—Shares to be paid for otherwise than in Cash—Statement of Consideration—Description of Property purchased—Reference to prior Contract—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A contract in writing between a vendor and a company, filed with the Registrar of Joint Stock Companies, recited that by a prior agreement of a certain date, made between the vendor and a trustee for the company, it was agreed that the vendor should sell and the company should purchase "certain leasehold messuages, shops, and premises" and "all the goodwill of the several businesses carried on by the vendor on the same respective premises, together with all the machinery, plant, horses and carts, fixtures and fittings used in connection with the said several businesses." It also recited the incorporation of the company, and that, by an agreement made between the vendor, the trustee, and the company, it was provided that the purchase-money should be paid or satisfied by the allotment to the vendor of a specified number of fully paid-up shares, and payment of a specified amount in cash. The contract then witnessed that it was agreed that the company should file "this agreement" and should allot to the vendor a specified number of fully paid-up shares, and that the same should be accepted by the vendor in satisfaction of that portion of the purchase-money which under the prior agreement was to be satisfied by the allotment of fully paid-up shares. Neither of the recited agreements was filed. On a motion, by holders of some of the fully paid-up shares issued to the vendor, to rectify the register by striking out their names:—

Held, that the contract which had been filed determined, within the meaning of s. 25 of the Companies Act, 1867, that payment for the shares allotted to the vendor was to be otherwise than in cash, and sufficiently stated the nature of the consideration for the issue of the shares.

Judgment of Romer J., [1898] 2 Ch. 556, affirmed.

In re Maynards, [1898] 1 Ch. 515, dissented from. *In re* S. Frost & Co. - - **C. A. 207**

5. —— *Debentures—Floating Charge—Sale of Business—Injunction.*

A company with power to amalgamate with or sell its business and assets to another company of the same kind, contracted so to sell. In an action on behalf of holders of debentures charged on the assets of the company, and maturing in case of a winding-up, an injunction was granted to restrain the company from parting with its assets. *In re* Borax Company. Foster *v.* Borax Company - - - **North J. 130**

6. —— *Deceased Member—Registered Address—Notice—Forfeiture of Shares—Alteration of Articles—Retrospective Operation.*

Apart from special provisions in their articles of association, a company having notice of the death of a member cannot bind his estate by posting to him at his registered address—

(*a*) A notice preliminary to forfeiting his shares for non-payment of calls due at his death, or

COMPANY—*continued.*

(*b*) A notice of an extraordinary general meeting to be held for the purpose of altering the articles in such manner as to impose a fresh liability on his shares.

New Zealand Gold Extraction Co. v. *Peacock*, [1894] 1 Q. B. 622, and *James* v. *Buena Ventura Nitrate Grounds Syndicate*, [1896] 1 Ch. 456, discussed and applied.

Whether a company can alter their articles for the sole purpose of retrospectively affecting the existing rights of the owner of a particular group of shares without his consent, *quære*. Allen *v.* Gold Reefs of West Africa, Limited **Kekewich J. 40**

7. —— *Director—Misfeasance—Payment of Dividends out of Capital—Banking Company—Losses charged against Capital—Right of Liquidator after Payment of Creditors to recover from Directors Dividends improperly paid—Damages for Misfeasance—Interest—Income Tax—Advances on Improper Security—Lien on Company's own Shares—Duty of Director—Negligence—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10—*Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

Though the paid-up capital of a limited company cannot be lawfully returned to the shareholders under the guise of dividends or otherwise, yet the law does not prohibit such a company—even if it be a banking company—from paying dividends unless its paid-up capital is intact.

The payment of dividends out of the excess of the receipts over the outgoings of a year, after making some allowance for bad debts, losses made in previous years being ignored and in effect thrown on the capital, does not amount to a payment of dividends out of capital. If paid-up capital has been lost, its subsequent application in the payment of dividends is impossible.

Excluding cases in which it would be obvious that a particular debt or outlay could not be reasonably charged to capital, the question what losses can be properly charged to capital and what to income is a matter for business men to determine, and on such a matter the opinions of honest and competent men may differ. There is no hard and fast legal rule on the subject.

But if expenses or payments are obviously improperly charged to capital simply to swell the apparent profits and to make it appear that dividends may properly be declared, dividends declared and paid under such circumstances can no more be justified than if they were paid out of capital.

A director who is acting honestly himself is entitled to trust the officers of the company not to conceal from him what they ought to report to him, if he has no reasonable ground for suspecting that they are deceiving him.

Directors are not liable for all their mistakes, but only for negligence which is in a business sense culpable or gross. Nor is a director liable for untrue representations made to the shareholders if he honestly believed the representations to be true and had at the time reasonable grounds for his belief.

The liquidator in the winding-up of a limited

COMPANY—*continued.*

company can recover from the directors dividends improperly paid by them, even though the creditors of the company have been satisfied.

Turquand v. *Marshall*, (1869) L. R. 4 Ch. 376, distinguished.

A director resigned his office, and his resignation was accepted by the board. After this his name appeared as one of the directors in a report presented by the board to the shareholders. He took no part in the preparation of the report or in recommending the dividend proposed by it:—

Held, that, even if he knew that his name appeared in the report as a director, he was not liable for the statements contained in it or the recommendation of the dividend.

Clause 15 of the articles of association of a limited banking company provided that the company should have a paramount lien on all the shares held by any shareholder for all his debts to the company, and empowered the directors in case of non-payment of any such debt, or in the event of the bankruptcy of the shareholder, to sell his shares, and apply the proceeds in discharge of his debt. Clause 98 empowered the directors to lend the funds of the company, or give credit, with or without security, and provided that no advances without security should be made or credit given to any director:—

Held, that the lien given by clause 15 was a security within clause 98, and that a loan might be made to a director without any other security than the lien, if the board considered his shares to be of sufficient value.

A former director of a banking company was ordered to pay to the liquidator of the company a sum of money, together with interest thereon at 5 per cent. per annum, on the ground that he had been guilty of a misfeasance in sanctioning the payment of dividends to the shareholders out of capital:—

Held, by Wright J., that the director was not entitled under s. 40 of the Income Tax Act, 1853, to deduct income tax from the interest, it being in the nature of damages. *In re* NATIONAL BANK OF WALES, LIMITED - - - C. A. 629

8. —— *Memorandum and Articles of Association—Promoters—Directors, Duties of—Fiduciary Relation—Appointment of Directors of one Company as Directors of the other—Contract—Sale by Directors in one Character to themselves in another—Dual Relation—Independent Board—Contract by Company with its Directors—Agency—Prospectus—Concealment from Shareholders of Material Facts — Misrepresentation — Misfeasance — Breach of Trust—Vendor and Purchaser—Voidable Contract — Rescission — Damages — Delay—Change of Position.*

The L. Company was promoted and formed by the directors of the L. Syndicate for the purpose of purchasing part of the property of the syndicate, consisting of nitrate works. The directors of the syndicate prepared and signed the memorandum and articles of association of the company, the articles nominating them as directors and stating specifically that they were also the directors of the syndicate. They also prepared the company's prospectus and purchase contract, and affixed the seals of the syndicate and of the company to the

COMPANY—*continued.*

latter. The company's solicitors and secretary were also the same as those of the syndicate. Two years after the date of the contract and the completion of the purchase the shareholders of the company, believing that their property had been purchased at an over-value and that there had been misrepresentations in the contract and prospectus, appointed an independent board of directors who, after investigating the facts and with the sanction of a general meeting of the shareholders, brought an action against the syndicate and the directors for rescission of the contract and damages on the ground of misrepresentation, misfeasance, breach of trust, and concealment of material facts, but not alleging fraud. From the date of the contract and down to and also since the commencement of the action the company had, first by its original directors and afterwards by its independent board, carried on business and worked the property the subject of the contract. At the trial Romer J. dismissed the action.

On appeal by the company:—

Held, by Lindley M.R. and Collins L.J., that the company was not entitled to rescission or damages, for (1) at the date of the contract the company had, by its memorandum and articles, notice that its directors were also the vendors or agents of the vendor syndicate, and the mere fact that its directors did not constitute an independent board was not a sufficient ground for setting aside the contract; (2) there had been no misrepresentation made to, or any material fact concealed from, any of the persons who were members of the company at the date of the contract, those persons being the directors themselves; (3) although the contract and prospectus were, on the evidence, misleading in certain particulars which would have entitled the company at the time to repudiate the contract, yet through the subsequent alteration of the property consequent on its being worked by the company, the position of the parties had been so changed that they could not be restored to their original position; and (4) the defendants, the directors, had not been guilty of such negligence or breach of trust as to render them liable in damages in law for the loss occasioned to the company, or in equity to make good the loss.

But *held*, by Rigby L.J., (1) that, in the promotion of the company, the preparation and sealing of the contract, and the preparation and issue of the prospectus, the original directors had, while acting as sole agents for the vendor syndicate, constituted themselves sole fiduciary agents for the purchasing company, and that the company was therefore entitled to rescission (but accounting for the profits of its working) on the principle that no fiduciary agent can bind his principal by a sale to him of such agent's property, where the principal has purchased without independent advice; and that the notice in the memorandum and articles of the company of the double relation of its directors was ineffectual to discharge them from the obligations involved in that principle; and (2) that the company had not lost its right to rescission either (*a*) through delay—for time did not run during the domination of the original directors and the non-

COMPANY—*continued.*

disclosure by them of material facts — or (*b*) through alteration of the property, the alteration having been in effect the act of the vendor syndicate by its directors.

Erlanger v. *New Sombrero Phosphate Co.*, (1878) 3 App. Cas. 1218, and *Salomon* v. *Salomon & Co.*, [1897] A. C. 22, discussed.

Statement of the principles as to (1) the fiduciary relationship between the promoters of a company and its shareholders; (2) the validity of contracts between a company and its directors as promoters; (3) the non-liability of directors for losses when acting intra vires and honestly; (4) the voidability of a contract for misrepresentation; and, (5) the impossibility of rescinding a contract after change of position. LAGUNAS NITRATE COMPANY *v.* LAGUNAS SYNDICATE

C. A. 392

9. —— *Reconstruction—Scheme—Agreement—Transfer or Sale of Undertaking to New Company—Shares in New Company, Application for—Time Limit—Appropriation by New Company of Unclaimed Shares—Shareholders of Old Company, Rights of—Forfeiture of Shares—Ultra Vires—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

Where, on the voluntary winding-up of a company, a reconstruction agreement is entered into, pursuant to a special resolution under s. 161 of the Companies Act, 1862, between that company and its liquidator of the one part and the new company of the other part, for carrying out a transfer or sale of the undertaking of the old company to the new, and providing that every holder of shares in the old company "shall be entitled as of right" to claim an allotment of an equivalent number of shares in the new company, further provisions fixing the time within which the application for shares must be sent in to the new company, and placing the shares not applied for within that time at the disposal of the new company, are not ultra vires; and therefore a member of the old company who is not a dissentient member within the proviso in the section, and whose application is out of time either through negligence or accident, such as absence abroad or illness, cannot compel the new company to allot him the shares.

But whether, on an application to sanction a proposed scheme of reconstruction containing a clause placing shares not applied for by members of the old company within a stipulated time at the disposal of the new company, the Court will sanction such a clause without some modification for the protection of members of the old company, *quære.*

Observations of Lord Esher M.R. in *Nicholl* v. *Eberhardt Co.*, (1889) 61 L. T. 489; 1 Megone, 402, not followed.

Decision of Kekewich J. reversed. BURDETT-COUTTS *v.* TRUE BLUE (HANNAN'S) GOLD MINE

C. A. 616

10. —— *Reconstruction—Shares partly paid up — Registration of Contract — Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

By an agreement of March, 1897, under which the defendant company had been reconstructed, it was provided that, as part of the consideration

COMPANY—*continued.*

for the transfer of the assets of the old company to the defendant company, the liquidator of the old company should be entitled to have allotted to him or his nominees 200,000 shares of 10*s.* each in the defendant company, with 7*s.* 6*d.* per share credited thereon as paid up, upon applying for the same within two months from the date of this agreement, and making a small further payment with such application. This agreement was filed with the Registrar of Joint Stock Companies; the plaintiff company having applied for 6500 of these 200,000 shares under the option so conferred upon them, the question was raised whether the filing of the above agreement was a sufficient compliance with s. 25 of the Companies Act, 1867:—

Held, following *Elsner and McArthur's Case*, [1895] 2 Ch. 759, that the filing of the reconstruction agreement of March, 1897, was a sufficient compliance with s. 25 of the Companies Act, 1867.

In re Coolgardie Consolidated Gold Mines, (1898) 14 Times L. R. 277, and *In re Jackson & Co.*, [1899] 1 Ch. 348, distinguished. TRANSVAAL EXPLORING COMPANY *v.* ALBION (TRANSVAAL) GOLD MINES, LIMITED - **Byrne J. 370**

11. —— *Reconstruction—Voluntary Winding-up—Sale of Assets—Dissentient Member — Purchase of Interest — "Agreement"—Arbitration—Time for making Award—Umpire—Jurisdiction—Arbitrators "Called on to Act"—Notice to appoint Umpire—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 16, 161, 162—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *Sched. I.* (*c*).

The articles of association of a company provided that, "If at any time a sale or arrangement shall be made or proposed in pursuance of s. 161 of the Companies Act, 1862, the purchase-money to be paid for the interest of any dissentient member shall be such sum of money as the liquidator can obtain by selling the shares, stock, or other property to which such dissentient member would have been entitled upon the completion of the sale or arrangement had he not expressed his dissent."

The company resolved upon a voluntary winding-up, and authorized the liquidator to enter into an arrangement for the sale of the business and assets of the company to a new company:—

Held, that the above clause of the articles did not amount to an "agreement" within the meaning of s. 162 of the Companies Act, 1862, so as to deprive a member of the company who dissented from the arrangements of his right under that section to have the value of his interest in the company determined by arbitration.

Decision of Stirling J. affirmed.

Semble, that the "agreement" intended by s. 162 is an agreement between the dissentient member and the liquidator in the winding-up of the company.

When a notice is served upon arbitrators by one of the parties to the arbitration to appoint an umpire, they are "called upon to act" in the matter of the arbitration within the meaning of clause (*c*) of Sched. I. to the Arbitration Act, 1889, and the three months within which the arbitrators are by that clause bound to make their

COMPANY—*continued.*
award run from the service of that notice upon them.

Decision of Stirling J., [1898] 2 Ch. 633, reversed. BARING-GOULD *v.* SHARPINGTON COMBINED PICK AND SHOVEL SYNDICATE - **C. A. 80**

12. —— *Winding-up — Contributory — Company Limited by Guarantee—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 9, 38.

In the winding-up of a company limited by guarantee, a member is only liable to be placed on the list of contributories in respect of the amount which by the memorandum of association of the company he has undertaken to contribute in the event of its being wound up. Although he may be sued for sums which he is only bound to pay under the articles of association, he is not liable as a contributory in respect of such sums.

Maxwell's Case, (1874) L. R. 20 Eq. 585, and *McKewan's Case*, (1877) 6 Ch. D. 447, distinguished. *In re* BANGOR AND NORTH WALES MUTUAL MARINE PROTECTION ASSOCIATION. BAIRD'S CASE - - - **Wright J. 593**

13. —— *Winding-up—Costs—Instructions for Brief—Trial of Issue of Fact before Judge—Originating Summons—Rules of Supreme Court*, 1883, *Order* LXXI., *r.* 1*a*; *Appendix N, Items* 81, 82, 82*a*.

A petition was presented for the compulsory winding-up of a company which was already in voluntary winding-up; but at the hearing the judge made no order except that the question was to be tried as on a summons under s. 138 of the Companies Act, 1862, "costs reserved"; he also fixed a certain date for the trial. On that date witnesses were examined, and the judge decided substantially in favour of the applicant with costs. No summons had so far been taken out, and on drawing up the order the registrar required a summons to be taken out in the voluntary winding-up. As an originating summons had previously been taken out by the liquidator for a private examination under s. 115 of the Act of 1862, on which an order had been made for an examination and reserving "liberty to apply," the registrar directed that the summons to be taken out and mentioned in the order was to be an ordinary and not an originating summons. On taxation the registrar disallowed the costs of instructions for brief:—

Held, by Wright J., that as the direction for trial treated the summons as issued in a "pending cause or matter," within the meaning of Rules of Supreme Court, 1883, Order LXXI., r. 1*a*, the summons was not an originating summons; that although, if Appendix N to the Rules, item 81, was construed strictly, it referred to an issue of fact directed to be tried as such, yet on taxation substance was to be regarded, and in substance the trial was of an issue of fact before a judge; and that the costs of instructions for the brief of the applicant's counsel must be allowed. *In re* CONSOLIDATED EXPLORATION AND FINANCE COMPANY **Wright J. 599**

14. —— *Winding-up—Fraudulent Preference — Preference for Conscience's Sake—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

The preferential payment of a creditor of a company within the three months prior to the point which, in the case of a company is, by s. 164 of the Companies Act, 1862, equivalent to an act of bankruptcy by an individual trader, is an undue or fraudulent preference if the payment is made, not merely to discharge a legal obligation, but because the directors think that it would be a hardship on the creditor and against their conscience to leave him to his right to prove in the winding-up.

In re Fletcher, (1891) 9 Morrell, 8, and *In re Vingoe and Davies*, (1894) 1 Manson, 416, followed. *In re* W. BLACKBURN & Co. BUCKLEY'S CASE - - - - **Wright J. 725**

15. —— *Winding-up—Public Examination—Petition by Official Receiver—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 8, 14.

It is not a matter of course to make a compulsory winding-up order under s. 14 of the Companies (Winding-up) Act, 1890, but the section applies to every case where the official receiver after such an order would possess any power which the voluntary liquidator cannot exercise and which is necessary in order that there may be an efficient winding-up in the interests of the creditors or contributories—e.g., where misfeasance proceedings are contemplated and a public examination is absolutely necessary in order to obtain a sufficient disclosure as to the facts. *In re* 1897 JUBILEE SITES SYNDICATE **Wright J. 204**

16. —— *Winding-up—Public Examination—Time for applying to Discharge Order—Disputing Finding in Official Receiver's Further Report—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8—*Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15.

A person applying to discharge an order for his public examination must come with reasonable promptitude, and a delay of two months is unreasonable. But *quære*, whether he is bound to apply within fourteen days after service of the order upon him.

A finding in the official receiver's further report under s. 8 of the Act of 1890 that a person has taken part in the promotion or formation of the company cannot be contradicted by that person by evidence. *In re* NATIONAL STORES, LIMITED - - - **Wright J. 773**

17. —— *Winding-up—Proof—Rules in Bankruptcy—Shareholder—Rectification of Register—Debts and Liabilities incurred before—Costs incurred after—Contingent Liability—Provable Debt—Unliquidated Damages—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 158—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37.

A shareholder in a limited company having applied, before its winding-up, for rectification of the register under s. 35 of the Companies Act, 1862, and repayment of the sum paid for his shares, obtained, after the winding-up, an order for rectification and repayment, and was admitted by the official receiver, who was also the liquidator, to prove for the sum ordered to be repaid, but not for the costs of the application:—

Held, by the Court of Appeal (affirming the decision of Wright J. on appeal from the official receiver), that the application not being a claim

COMPANY—*continued.*
for unliquidated damages, and the register having been rectified, the sum sought to be repaid was clearly a provable debt, and accordingly that, under s. 37 of the Bankruptcy Act, 1883, made applicable to companies in liquidation by s. 10 of the Judicature Act, 1875, the costs should be added to the provable debt.

The rules as to proof in bankruptcy for costs of proceedings taken against the bankrupt before or after the bankruptcy, stated. *In re* British Gold Fields of West Africa - - **C. A. 7**

—— Directors' liability—Action by shareholder for compensation in respect of untrue statement in prospectus - - **523**
See Limitations, Statute of. 1.

—— Equitable mortgage of shares to secure debt —Foreclosure action after debt barred
See Limitations, Statute of. 2. **161**

—— Telephone company—Right to lay wires **282**
See Telephone Company.

COMPULSORY POWERS—Widening streets—House — Taking whole — Part only required - - - - **169**
See London.

CONDITION — Title — Reverter — Common law condition—Shifting use—Rule against perpetuities - - - **540**
See Vendor and Purchaser. 7.

CONFLICT OF LAWS — *Contract—Local Law applicable—Partial Invalidity under one Local Law—Locus Contractûs—Locus Solutionis—Form—Parties—Intention.*

Consideration of the elements material, in case of doubt as to the local law governing a contract, for ascertaining under what local law the parties intended to contract.

Preference should be given, other things being equal, to the law of the place with which the transaction has the most real connection.

The partial invalidity of the contract under one of the local laws possibly applicable thereto is among other circumstances relevant, but not conclusive.

So far as the residence of any party is material, actual and not nominal residence is to be considered.

A contract for the performance of services in the South African Republic, Natal, and elsewhere in South Africa was made in the South African Republic.

The parties were an English company with a registered office, directors, and secretary in England, but carrying on business solely in South Africa, and an English employee resident in the South African Republic.

The contract was in English form, and was modelled on a similar expired contract made in England between the company's predecessors and the employee for the performance of similar services in the South African Republic, and in Natal, or elsewhere. The contract contained a stipulation of doubtful validity under the law of the South African Republic; but both parties were aware of the point, and made and accepted the stipulation for what it was worth:—

Held, applying the principles laid down in *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202, *Jacobs* v. *Crédit Lyonnais*, (1884) 12 Q. B. D. 589, and *In re Missouri Steamship Co.*, (1889) 42 Ch. D. 321, that the contract was intended to be governed by the law of the South African Republic. South African Breweries, Limited *v.* King - - **Kekewich J. 173**

CONSENT — Leaseholds — Assignment — Default of vendor in obtaining lessor's consent—Loss of bargain—Damages - **320**
See Vendor and Purchaser. 1.

—— Of tramway company—Right to lay wires—Power to open street - - **282**
See Telephone Company.

CONSIDERATION—Statement of—Sufficiency.
See Company. 2—4. - **207, 480, 509**

CONSPIRACY. AND PROTECTION OF PROPERTY—Strike—"Watching or besetting"—Interlocutory injunction **35, 696**
See Trade Union. 2, 3.

CONTRACT—Filed contract—Sufficiency of
See Company. 2—4. **207, 480, 509**

—— For sale — Leaseholds — Assignment — Lessor's consent—Default of vendor in obtaining—Loss of bargain—Damages.
See Vendor and Purchaser. 1. **320**

—— Locus contractûs—Locus solutionis—Partial invalidity under one local law — Intention - - - - **173**
See Conflict of Laws.

—— Registration—Reconstruction of company—Shares partly paid up - - **370**
See Company. 10.

—— Restraint of trade—Evidence of reasonableness inadmissible - - - **13**
See Master and Servant.

—— Sale by directors in one character to themselves in another—Voidable contract—Rescission—Damages - - **392**
See Company. 8.

CONTRIBUTORY—Guarantee—Company limited by—Winding-up - - - **593**
See Company. 12.

CONVERSION—Absolute gift subject to executory limitation—Reversionary interest—Enjoyment in specie - - **336**
See Will. 2.

CONVEYANCING AND LAW OF PROPERTY—Debt — Part payment by receiver — Acknowledgment — Statute of Limitations - - - - **107**
See Mortgage. 1.

COPYRIGHT — *Newspaper — Reports of Public Speeches—"Author"—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18.

There is no copyright in a full and accurate report of a speech delivered in public, the words of the speaker being taken down in shorthand, and the notes being afterwards transcribed by the reporter and published in a newspaper.

The reporter is not the "author" of the report within the meaning of the Copyright Act, 1842.

Decision of North J. reversed.

But there may be copyright in a summary of a speech made by a reporter in his own language.
Walter *v.* Lane - - - **C. A. 749**

COSTS—Appeal as to—Trustee—"Costs, charges and expenses"—Discretion of judge. *See* Practice. 1 - - - 467

—— Instructions for brief—Trial of issue of fact before judge—Originating summons. *See* Company. 13. 599

—— Proof — Provable debt — Unliquidated damages - - - - 7 *See* Company. 17.

—— Trustees — Severance — Allowance of two counsel—Taxation - - 588 *See* Trustee.

COUNCIL—Parish council—Right to sue 277 *See* Parish Council.

COUNSEL — Trustees — Costs of severance — Allowance of two counsel—Taxation *See* Trustee. 588

COUNTER-CLAIM—Striking out—Payment into court — Satisfaction — Admission of plaintiff's claim - - - 93 *See* Practice. 3.

COVENANT—By joint owners—When construed as several or joint and several — Survivorship - - - 289 *See* Patent.

—— Liability to pay rent and perform covenants —Leaseholds—Specific bequest - 54 *See* Tenant for Life. 2.

—— Restrictive covenants—Form of conveyance *See* Vendor and Purchaser. 6. 515

—— To settle wife's after-acquired personalty—Infant wife—Ratification - 569 *See* Settlement. 1.

CUSTOM — Deposit — Cheque for — Refusal to accept highest bidder - - 73 *See* Vendor and Purchaser. 2.

DAMAGE—Gas company—Statutory powers—Nuisance—Excavation—Injunction 217 *See* Support.

—— Negligently letting loose water confined in mine by cutting drifts. *See* Mine. 2.

DAMAGES—Leaseholds—Assignment—Lessor's consent—Default of vendor in obtaining —Loss of bargain - - - 320 *See* Vendor and Purchaser. 1.

—— Loan to husband—Bond by husband—Interest on bond—Statute of Limitations - - - - 561 *See* Husband and Wife. 3.

—— Sale by directors in one character to themselves in another — Voidable contract —Rescission - - - 392 *See* Company. 8.

DEATH—Deceased member—Registered address —Notice—Forfeiture of shares - 40 *See* Company. 6.

—— Deceased person—Declaration of, against interest—Act of ownership—Admission by tenant as to landlord's title - 121 *See* Evidence.

DEBENTURES — Floating charge — Sale of business—Injunction - - 130 *See* Company. 5.

DEBT—Equitable mortgage of shares in a company to secure debt—Foreclosure action after debt barred - - - 161 *See* Limitations, Statute of. 2.

—— Part payment by receiver—Acknowledgment —Statute of Limitations - - 107 *See* Mortgage. 1.

DEED—Title-deeds—Purchaser for value without notice—Omission to require production—Equitable mortgage—Priority. *See* Mortgage. 4. 264

DELAY—Sale by directors in one character to themselves in another—Voidable contract—Rescission—Damages - 392 *See* Company. 8.

DEPOSIT—Cheque for—Custom—Sale of land by auction—Refusal to accept highest bidder - - - - 73 *See* Vendor and Purchaser. 2.

DIRECTOR—Liability—Action by shareholder for compensation in respect of untrue statement in prospectus - - 523 *See* Limitations, Statute of. 1.

—— Misfeasance—Payment of dividends out of capital—Right of liquidator to recover from directors - - - 629 *See* Company. 7.

—— Sale by directors in one character to themselves in another—Voidable contract—Rescission—Damages - - 392 *See* Company. 8.

DISCHARGE—Time for applying to discharge order—Public examination - 773 *See* Company.

DISCRETION—Costs—Appeal as to—Trustee—"Costs, charges and expenses" - 467 *See* Practice. 1.

—— Heirlooms—Sale—Extravagance of tenant for life - - - 679, 691, n. *See* Settled Land. 2, 3.

DISSOLUTION — Trade union — Unexpended funds—Resulting trust - - 184 *See* Trade Union. 1.

DISTRIBUTION—Period of—Class gift—Lapse—Survivorship - - - 314 *See* Will. 1.

DIVIDEND—Payment out of capital—Misfeasance —Right of liquidator to recover from directors - - - - 629 *See* Company. 7.

DOCUMENT — Ancient document tendered in support of ancient possession—Act of ownership — Declaration of deceased person against interest - - 121 *See* Evidence.

DRAIN — Nuisance — Injunction — Prescriptive right in third parties to drain into sewers *See* Local Government. 1. 378

DUTY—Settlement estate duty - - 489 *See* Revenue.

ECCLESIASTICAL LAW—Ecclesiastical land—"Settlement"—"Succession" - 138
See SETTLED LAND. 1.

EQUITABLE ASSIGNEES — Lease — Option of purchase — "Assigns" — Possession — Notice—Waiver - - - 261
See LANDLORD AND TENANT. 1.

EQUITABLE MORTGAGE—Of shares in a company to secure debt—Foreclosure action after debt barred - - - 161
See LIMITATIONS, STATUTE OF. 2.

—— Purchaser for value without notice—Omission to require production of title-deeds—Priority - - - - 264
See MORTGAGE. 4.

EQUITY OF REDEMPTION—Clog on—Collateral advantage—Presumption of pressure on mortgagor - - - - 474
See MORTGAGE. 2.

ESTATE DUTY — Incidence — Settlement not made by will but by antecedent instrument - - - - - 489
See REVENUE.

EVICTION—Of grantee from part of land—Grant or reservation—Apportionment of rent-charge—Acreage or value - - 199
See RENT-CHARGE.

EVIDENCE — *Admissibility — Ancient Document tendered in Support of Ancient Possession—Act of Ownership — Declaration of Deceased Person against Interest — Admission by Tenant as to Landlord's Title.*

In an action brought to determine the title to certain land, the plaintiff tendered in evidence an ancient document coming from the proper custody which purported to be signed by M., a tenant of a predecessor in title of the defendant, and which stated that J., a predecessor in title of the plaintiff, had been persuaded to stop all proceedings at law that he then had against M. for wilfully and without leave bringing his sheep and cattle on to J.'s freehold land therein specified (which was assumed to be part of the land in dispute) for which wilful trespass M. bound himself to pay 16s. costs, and that he would for the future keep his own and other people's sheep and cattle from trespassing on the said land to the utmost of his power:—

Held, that the document was admissible in evidence, not as an admission by the tenant as to title, in which case it would not be evidence against the landlord, but as evidence of an act of ownership by a predecessor in title of the plaintiff.

Decision of Byrne J. reversed.

The principle of *Malcomson* v. *O'Dea*, (1863) 10 H. L. C. 593, applied.

Papendick v. *Bridgwater*, (1855) 5 E. & B. 166, distinguished. BLANDY-JENKINS *v.* EARL OF DUNRAVEN - - - - C. A. 121

—— Interlocutory motion — Information and belief—Insufficient affidavit - 50
See PRACTICE. 2.

—— Reasonableness—Inadmissibility—Restraint of trade—Contract - - 13
See MASTER AND SERVANT.

EXAMINATION—Public—Time for applying to discharge order — Winding-up of company - - - - - 773
See COMPANY. 16.

—— Public—Winding-up of company—Petition by official receiver - - - 204
See COMPANY. 15.

EXCAVATION—Gas company—Statutory powers—Nuisance—Injunction - - 217
See SUPPORT.

EXECUTOR—Not express trustee for next of kin—Title of heir-at-law and next of kin barred by Statute of Limitations 149
See CHARITY.

EXECUTORY LIMITATION — Absolute gift subject to — Reversionary interest — Conversion—Enjoyment in specie 336
See WILL. 2.

FALSA DEMONSTRATIO — Lease — Parcels — Right of way—Misdescription—Common mistake—Rectification - - 309
See LANDLORD AND TENANT. 2.

FIDUCIARY RELATION—Directors, Duties of—Sale by directors in one character to themselves in another - - 392
See COMPANY. 8.

—— Husband and wife—Solicitor and client—Benefit to relative of solicitor—Rectification of settlement - - 578
See SETTLEMENT. 2.

FILING—Filed contract—Sufficiency of - 207,
See COMPANY. 2—4. 480, 509

FINANCE—Settlement estate duty—Incidence—Settlement not made by will but by antecedent instrument - - 489
See REVENUE.

FLOATING CHARGE — Debenture — Sale of business—Injunction - - 130
See COMPANY. 5.

FORECLOSURE — Action after debt barred — Equitable mortgage of shares in a company to secure debt - - 161
See LIMITATIONS, STATUTE OF. 2.

FORESHORE—Crown lease—Injunction—Limits of public user - - - 705
See SEASHORE.

FORFEITURE — Shares — Deceased member — Registered address—Notice - 40
See COMPANY. 6.

—— Shares — Reconstruction — Scheme—Appropriation by new company of unclaimed shares - - - - 616
See COMPANY. 9.

FRAUDS, STATUTE OF—Deposit—Cheque for—Custom — Refusal to accept highest bidder - - - - 73
See VENDOR AND PURCHASER. 2.

FRAUDULENT PREFERENCE — Preference for conscience's sake - - - 725
See COMPANY. 14.

GAS COMPANY—Statutory powers—Nuisance—Surface, Letting down—Ancient lights, Interference with—Injunction - 217
See SUPPORT.

GLEBE—Sale by vicar—Purchase by trustee of settled estate—Successive tenants for life—Charge on trust estate—Vendor's lien - - - - - - 729
See VENDOR AND PURCHASER. 3.

GRANT—Reservation from—Redrock and coal neither having any commercial value—Injunction - - - - 190
See MINE. 1.

—— Reservation or—Eviction of grantee from part of land—Apportionment of rent-charge—Acreage or value - 199
See RENT-CHARGE.

GRANT OF PROBATE—To husband—Implied assent to will—Married woman—Invalid bequest - - - - - 1
See HUSBAND AND WIFE. 1.

GUARANTEE—Company limited by—Winding-up—Contributory - - - 593
See COMPANY. 12.

HEIRLOOMS — Sale—Discretion of Court—Extravagance of tenant for life **679, 691, n.**
See SETTLED LAND. 2, 3.

HUSBAND AND WIFE — *Probate — Married Woman—Will—Invalid Bequest—Grant of General Probate to Husband—Implied Assent to Will.*

Since the coming into operation of the amended rules 15 and 18 of the Probate Rules (Non-contentious Business), which provide that probate of the will of a married woman shall take the form of ordinary grants of probate without any exception or limitation, a husband who obtains probate of his wife's will in general form is not deemed to have assented to the will as a disposition of property which she had no right to dispose of by will without his assent.

Decision of Stirling J., [1898] 1 Ch. 637, affirmed.

Held, further, that upon the true construction of the will the property in dispute was not included in the bequest, and, therefore, that the question of assent did not arise. *In re* ATKINSON. WALLER *v.* ATKINSON - - **C. A. 1**

2. —— *Separate Estate—Married Woman—Restraint on Anticipation—Separate Trading—Bankruptcy of Married Woman—Death of Husband—Title of Trustee in Bankruptcy—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5; *s.* 19—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 152.

Where a married woman, entitled to separate estate with a restraint on anticipation, trades separately from her husband and becomes bankrupt, her separate estate, subject to the restraint on anticipation, vests in her trustee in bankruptcy and, on the death of her husband in her lifetime, is assets for her creditors.

In such a case the restraint on anticipation is in the nature of an incumbrance which is removed by the death of the husband.

Pelton Brothers v. *Harrison*, [1891] 2 Q. B. 422, discussed. *In re* WHEELER'S SETTLEMENT TRUSTS. BRIGGS *v.* RYAN - - **Cozens-Hardy J. 717**

HUSBAND AND WIFE—*continued.*

3. —— *Separate Property—Loan to Husband—Bond by Husband—Interest on Bond—Statute of Limitations—Damages—Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 5.

Under a marriage settlement dated in 1847, certain real estate was vested in trustees upon trust for the wife for life, with remainder to the husband for life, with remainders over. The settlement contained a power of sale and for reinvestment with the consent of the husband or wife on real or personal security.

The estate having been sold, the trustees in 1852, on the written request of the wife, advanced the proceeds of sale to the husband on the security of his bond, conditioned for repayment of the sum advanced six months after date with interest at 4*l.* per cent.

The husband and wife lived together in amity for more than twenty years after the date of the bond, the wife dying in 1876 and the husband in 1896. The husband never during his wife's lifetime or afterwards paid any interest on the bond, or gave any written acknowledgment to the trustees of the settlement:—

Held, that, the hand to pay and to receive the interest being the same, no payment over was necessary, and, therefore, that the Statute of Limitations did not run, and the bond was still subsisting.

In re Hawes, (1892) 41 W. R. 173; *Stone* v. *Stone*, (1869) L. R. 5 Ch. 74; *Spickernell* v. *Hotham*, (1854) Kay, 669, 673, discussed.

Interest is payable as interest and not as damages under a bond having a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, even although no express mention of interest is made in the bond. The amount of interest recoverable is not diminished by reason only of the bond being conditioned for payment of principal and interest up to or at a certain date.

Bonafous v. *Rybot*, (1763) 3 Burr. 1370; *Farquhar* v. *Morris*, (1797) 7 T. R. 124; *Amos* v. *Smith*, (1862) 1 H. & C. 238, discussed. *In re* DIXON. HEYNES *v.* DIXON - **Byrne J. 561**

—— Settlement — Rectification — Solicitor and client — Fiduciary relation — Benefit to relative of solicitor - - - 578
See SETTLEMENT. 2.

INCOME TAX — Damages for misfeasance — Interest—Director - - - 629
See COMPANY. 7.

INCUMBRANCE—Private street—Improvements—Charge on premises—Date—Vendor and purchaser - - - 496
See LOCAL GOVERNMENT. 3.

INFANT — Marriage settlement—Ratification—Repudiation—Rectification - 569
See SETTLEMENT. 1.

INJUNCTION—Foreshore—Crown lease—Limits of public user - - - 705
See SEASHORE.

—— Gas company—Statutory powers—Nuisance—Excavation - - - 217
See SUPPORT.

INJUNCTION—*continued.*

—— Interlocutory—Strike—"Watching or besetting" - - - **35, 696**
See TRADE UNION. 2, 3.

—— Nuisance — Prescriptive right in third parties to drain into sewers - **378**
See LOCAL GOVERNMENT. 1.

—— Reservation from grant—Redrock and coal neither having any commercial value
See MINE. 1. **190**

—— Restraint of trade—Contract—Evidence of reasonableness inadmissible - **13**
See MASTER AND SERVANT.

—— Sale of business — Debentures — Floating charge - - - - **130**
See COMPANY. 5.

—— Spring—Alteration of natural flow—Riparian owner - - - - **360**
See RIPARIAN OWNER. 2.

—— Stream—Alteration of flow—Local authority—"Injuriously affecting" - **608**
See RIPARIAN OWNER. 1.

INSTALMENTS—Purchase-money payable by—Repudiation by purchaser — Right of vendor to instalments paid - **710**
See VENDOR AND PURCHASER. 4.

INTEREST—Loan to husband—Bond by husband—Statute of Limitations - - **561**
See HUSBAND AND WIFE. 3.

—— Payment of interest on shares—Ultra vires—New rules—Known insolvency at time of passing - - - **60, 64, n.**
See BUILDING SOCIETY. 1, 2.

INTERLOCUTORY INJUNCTION — Strike — "Watching or besetting" - **35, 696**
See TRADE UNION. 2, 3.

INTERLOCUTORY MOTION — Evidence — Information and belief — Insufficient affidavit - - - - **50**
See PRACTICE. 2.

INTESTACY — Will — Remoteness — Vesting — Maintenance - - - **739**
See WILL. 3.

ISSUE OF SHARES—Fully paid-up—Registered contract — Sufficiency — Statement of consideration - **207, 480, 509**
See COMPANY. 2—4.

JOINT PATENTEES—Covenant by—When construed as several or joint and several—Survivorship - - - **289**
See PATENT.

JOINT TENANCY—Tacking—Further advance—Second mortgage—Trustees - **355**
See MORTGAGE. 5.

JUSTICES — Street — Paving, &c., expenses — Alteration of scheme — Notice — Discretion - - - - **603**
See LOCAL GOVERNMENT. 2.

LANDLORD AND TENANT—*Lease—Option to Purchase — "Assigns" — Equitable Assignees — Possession—Notice—Waiver.*

Decision of Romer J., [1899] 1 Ch. 86, reversed on the facts; the correspondence between the parties shewing that the contracting parties had proceeded on the assumption that the plaintiffs, though equitable assignees only of the lease, were entitled to exercise the option of purchase thereby given, and also shewing that the defendant, the reversioner in fee, had waived the notice required by the lease to be given of the intention to exercise the option. FRIARY HOLROYD AND HEALEY'S BREWERIES, LIMITED *v.* SINGLETON **C. A. 261**

2. —— *Lease—Parcels—Right of Way—Misdescription—Falsa Demonstratio—Common Mistake—Rectification—Construction of Lease.*

Where in a grant or devise the description of parcels is made up of more than one part, and one part is true and the other false, there, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected as falsa demonstratio, and will not vitiate the grant or devise. The doctrine is not to be confined to cases where the first part of the description is true and the latter untrue, it being immaterial in what part of the description the falsa demonstratio occurs.

Rooms on the second floor of Nos. 13 and 14, Old Bond Street, were demised, together with free ingress and egress for the lessee "through the staircase and passages of No. 13" to and from the demised premises: there was no staircase in No. 13 leading to the demised premises, but there was a staircase in No. 14:—

Held, upon the evidence, that there had been a common mistake, the intention of the parties being that the lessee should have the use of the staircase of No. 14, and that accordingly the doctrine of falsa demonstratio did not apply; but the Court ordered the lease to be rectified by the substitution of the staircase of "No. 14" for that of "No. 13," thus in effect affirming the order of Romer J., [1898] 2 Ch. 551. COWEN *v.* TRUEFITT, LIMITED - - - - **C. A. 309**

—— Lease—Minerals—Open or unopen mine—Pieces of land separated by narrow strip belonging to different owner - **347**
See SETTLED LAND. 4.

LAPSE—Class gift—Survivorship—Period of distribution - - - - **314**
See WILL. 1.

LEASE.
See LANDLORD AND TENANT.

LEASEHOLDS—Assignment—Lessor's consent—Default of vendor in obtaining—Loss of bargain—Damages - - **320**
See VENDOR AND PURCHASER. 1.

—— Specific bequest—Liability to pay rent and perform covenants - - - **54**
See TENANT FOR LIFE. 2.

LICENCE—To take water—Public well—Local authority—Injunction - - **360**
See RIPARIAN OWNER. 2.

LIEN—Advances on improper security—Lien on company's own shares—Duty of director
See COMPANY. 7. **629**

LIEN—*continued.*

—— Glebe—Sale by vicar—Purchase by trustee of settled estate—Successive tenants for life—Charge on trust estate—Vendor's lien - - - - - 729
See VENDOR AND PURCHASER. 3.

LIMITATIONS, STATUTE OF — *Company—Prospectus—Action by Shareholder for Compensation in respect of Untrue Statement in Prospectus of Company—Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3—*Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3.

The provision of s. 3 of the statute 3 & 4 Will. 4, c. 42, whereby "all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force" are required to be brought within two years after the cause of action, refers to actions for penalties, or damages or sums of money in the nature of penalties, and does not apply to an action by a shareholder against the directors of a company to recover, under the Directors' Liability Act, 1890, compensation for loss or damage sustained by him by reason of an untrue statement in the prospectus of the company on the faith of which he subscribed for shares. THOMSON *v.* LORD CLANMORRIS - **Kekewich J. 523**

2. —— *Mortgage of Personal Property — Equitable Mortgage of Shares in a Limited Company to secure Simple Contract Debt—Foreclosure Action after Debt barred.*

Where a bank had an equitable charge on shares in a limited company to secure a simple contract debt and after the debt was barred brought an action to enforce their security by foreclosure or sale:—

Held, that the bank were not deprived of their remedy against the property by the fact that the personal remedy for the debt was barred, and that, there being no Statute of Limitations applicable to foreclosure of a mortgage of personal property, the security was enforceable. LONDON AND MIDLAND BANK *v.* MITCHELL **Stirling J. 161**

—— Debt—Part payment by receiver—Inference of promise to pay—Acknowledgment
See MORTGAGE. 1. 107

—— Loan to husband — Bond by husband — Interest on bond - - - 561
See HUSBAND AND WIFE. 3.

—— Title of heir-at-law and next of kin barred by—Executor not express trustee for next of kin - - - - 149
See CHARITY.

LIQUIDATOR—Right of liquidator after payment of creditors to recover from directors dividends improperly paid - 629
See COMPANY. 7.

LOCAL AUTHORITY — Stream — Alteration of flow—"Injuriously affecting"—Injunction - - - - - 608
See RIPARIAN OWNER. 1.

LOCAL GOVERNMENT—*Sewers — Discharge of Sewage on to Private Lands—Nuisance—Claim of Right for Inhabitants of a Parish—Injunction—Prescriptive Right in Third Parties to Drain into Sewers—Power of Sanitary Authority to stop existing and future Connections with Sewers — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 21, 299.

In an action by a landowner against a corporation (the urban sanitary authority for the borough of D.) for an injunction to restrain them from discharging or allowing to be discharged sewage upon his lands from the sewers vested in them so as to cause a nuisance, the defendants set up a prescriptive right based on the presumption of a lost grant by the plaintiff's predecessors in title to trustees for the benefit of the inhabitants of the borough to drain all sewage from any tenements built or to be built within the borough, and to discharge the same on the plaintiff's lands. This claim of right failed. It was proved, however, that there were a number of houses in the borough in respect of which prescriptive rights had been acquired to pass sewage into and along the sewers, and that there were other houses the connections of which with the sewers had been made with the consent or by the acquiescence of the defendants:—

Held, that an injunction could not be granted so as to interfere with the prescriptive rights that had been acquired, nor to oblige the defendants to stop up the connections of the other houses which they had sanctioned; but that an injunction must be granted to restrain the defendants from authorizing or directing any sewage to flow or be discharged on to the plaintiff's lands from sewers vested in them as the sanitary authority.

Attorney-General v. *Acton Local Board*, (1882) 22 Ch. D. 221, and *Attorney-General* v. *Clerkenwell Vestry*, [1891] 3 Ch. 527, followed.

Held, also, following *Ainley* v. *Kirkheaton Local Board*, (1891) 60 L. J. (Ch.) 734, that a householder has an absolute right under s. 21 of the Public Health Act, 1875, to connect his drains with a sewer, subject only to the regulations prescribed by the local authority in whom the sewer is vested as to the manner in which the connections are to be made, and therefore that an injunction could not be granted to restrain the defendants from allowing any future connections to be made with their sewers.

Charles v. *Finchley Local Board*, (1883) 23 Ch. D. 767, dissented from on this point.

Held, further, that the plaintiff ought to have applied to the Local Government Board under s. 299 of the Public Health Act, 1875, to make an order on the defendants to adopt a proper system of sewage for their district. BROWN *v.* DUNSTABLE CORPORATION **Cozens-Hardy J. 378**

2. —— *Street—Paving, &c., Expenses—Apportionment — Frontager — Objection — Alteration of Scheme—Notice—Justices—Jurisdiction — Discretion—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8, 11, 12, 13.

Where a resolution has been passed by an urban authority under s. 6, sub-s. 1, of the Private Street Works Act, 1892, approving the plans, sections, estimates, and provisional apportionments for making up the whole of a street, and the resolution has been published and copies thereof have been served on the frontagers under sub-s. 3, the justices have, on the hearing of an

LOCAL GOVERNMENT—*continued.*
objection by a frontager under s. 7 that part of the street is repairable by the inhabitants at large, jurisdiction under s. 8, sub-s. 1, to amend the resolution, plans, &c., by limiting the scheme to the remaining portion of the street; and the urban authority can then carry out the amended scheme without it being necessary for them to begin their proceedings de novo or to pass a resolution approving the amended scheme.

Where, on the hearing of an objection to the original scheme, the justices have decided upon amending the scheme, the question whether or not, under s. 8, sub-s. 1, they shall adjourn the hearing and direct any further notices to be given, is a matter entirely within their discretion; but where the amendment is of a material character, it is desirable, though not obligatory upon them, that they should adjourn the hearing and direct further notices to be given in order that persons affected by the amended scheme may have an opportunity of being heard.

Decision of Stirling J., [1899] 1 Ch. 168, affirmed. TWICKENHAM URBAN COUNCIL *v.* MUNTON - - - - - **C. A. 603**

3. —— *Streets—Private Street—Improvements — Charge on Premises — Date — Completion of Works — Final Apportionment — Incumbrance — Vendor and Purchaser—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *s.* 13.

The apportioned expenses of private street works executed under the Private Street Works Act, 1892, become a charge on the premises affected thereby as from the date of the completion of the works, and not merely as from the date of the final apportionment.

If, therefore, the premises are sold free from incumbrances after the completion of the works, but before the date of the final apportionment, the sum finally apportioned thereon is payable by the vendor. STOCK *v.* MEAKIN **Kekewich J. 496**

—— Parish council—Right to sue - - **277**
See PARISH COUNCIL.

LOCUS SOLUTIONIS—Locus contractûs—Intention—Partial invalidity under one local law - - - - - **173**
See CONFLICT OF LAWS.

LONDON — *Streets and Highways — Widening Streets — Compulsory Powers — House — Taking whole — Part only required — Michael Angelo Taylor's Act* (57 *Geo.* 3, *c. xxix.*), *s.* 80.

A local authority requiring part of a house for the purpose of widening a street under Michael Angelo Taylor's Act cannot give notice to treat for and take the whole house against the wishes of the owner, unless they prove that the remainder is useless to him; and this is so, even though the removal of the part actually required would destroy the identity of the house, as a house, to such an extent that the owner might have compelled them to take the whole if they had given notice to treat for part only. ALDIS *v.* LONDON CORPORATION - **Kekewich J. 169**

MAINTENANCE—Will—Remoteness—Intestacy—Vesting - - - - - **739**
See WILL. 3.

MARRIAGE SETTLEMENT—Covenant to settle wife's after-acquired personalty—Wife under age — Ratification—Repudiation—Rectification - - - **569**
See SETTLEMENT. 1.

MARRIED WOMAN.
See Cases under HUSBAND AND WIFE.

MASTER AND SERVANT—*Contract—Restraint of Trade — Reasonableness — Limit of Space—Limit of Time—Injunction—Evidence of Reasonableness inadmissible.*

An agreement made in 1894 between the plaintiff, a hardware manufacturer at Dudley, and the defendant, a young man of twenty-four, on the defendant entering the plaintiff's service, contained a restrictive clause that the defendant would not, during his service or after the determination thereof, divulge to any person the secrets of the plaintiff or the mode of conducting his business, or any part thereof, or any information with regard to the same, or after the determination of such service work for or serve any other person or firm carrying on the same kind of business, or any part thereof, within a radius of twenty-five miles from the plaintiff's works at Dudley, without his consent. In 1897 the defendant left the plaintiff's service, and in 1899, without his consent, entered the service of a firm carrying on a business similar to that of the plaintiff about three miles from his works.

In an action by the plaintiff against the defendant to restrain him from continuing in the service of the firm, and from any further breach of the agreement:—

Held, by the Court of Appeal, affirming Stirling J., that the plaintiff was entitled to an injunction, since the restrictive clause was not void either as being unreasonable for the plaintiff's protection, or as being unlimited in point of time and so binding the defendant during his whole life.

In an action by a trader against his servant for breach of a contract restricting him from serving a rival trader, evidence from persons in the trade giving their views as to the reasonableness or unreasonableness of the contract is inadmissible, since the reasonableness of a contract depends on its true construction and legal effect and is consequently a question for the Court alone.

The validity of agreements in restraint of trade discussed. HAYES *v.* DOMAN - - **C. A. 13**

MEMORANDUM OF ASSOCIATION—Subscribers to—Special agreement as to calls **302**
See COMPANY. 1.

MINE—*Mines and Minerals—Reservation from Grant—Redrock and Coal neither having any Commercial Value—Injunction.*

The defendants were the lessees of certain lands under a lease dated September 30, 1860, granted by the predecessor in title of the plaintiff.

The lease contained the following reservation: "Except nevertheless and always reserved out of this demise all mines and minerals within or under the said land."

The defendants had, for the purpose of obtaining water, commenced to construct a bore-

MINE—*continued.*
hole eighteen inches in diameter, and had already bored through a stratum of redrock and a layer of coal from six to eight inches in thickness:—

Held, that although the substances in question could not (as was admitted) be worked at a profit at the present time, they fell within the reservation in the lease as being substances which had "a use and a value of their own independent of and separable from the rest of the soil," and that the plaintiffs were entitled to an injunction to restrain the defendants from boring or removing any mines or minerals in or under the land.

Hext v. *Gill*, (1872) L. R. 7 Ch. 699, *Earl of Jersey* v. *Neath Union*, (1889) 22 Q. B. D. 555, and *Lord Provost and Magistrates of Glasgow* v. *Farie*, (1888) 13 App. Cas. 657, examined and explained. JOHNSTONE *v.* CROMPTON & Co.
Byrne J. 190

2.—— *Negligently letting loose Water confined in Coal Mine by cutting Drifts—Damage to House over Mine—Liability.*

LITTLEDALE *v.* EARL OF LONSDALE, reported (1793-4) 2 H. Bl. 267, 299; 2 Anstr. 356; 5 Bro. P. C. 519 - - - - - - 233, n.

—— Lease—Open or unopen mine—Pieces of land separated by narrow strip belonging to different owner - - - 347
See SETTLED LAND. 4.

MISFEASANCE—Director — Payment of dividends out of capital—Right of liquidator to recover from directors - - 629
See COMPANY. 7.

MISJOINDER—Parties—Joint cause of action—Watching and besetting—Interlocutory injunction - - - - - 696
See TRADE UNION. 3.

MISREPRESENTATION—Sale by directors in one character to themselves in another — Voidable contract — Rescission — Damages - - - - - 392
See COMPANY. 8.

MISTAKE—Contract—Rescission—Right to obtain—Undisclosed restrictive covenants
See VENDOR AND PURCHASER. 6. 515

—— Lease — Parcels—Right of way—Misdescription — Falsa demonstratio—Rectification - - - - - 309
See LANDLORD AND TENANT. 2.

MORTGAGE—*Business—Receiver and Manager—Executor of Mortgagor, Agent for—Debt—Simple Contract—Part Payment by Receiver—Promise to pay, Inference of—Acknowledgment—Statute of Limitations* (21 *Jac.* 1, *c.* 16), *s.* 3—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 24.

H., the owner of a business, mortgaged it to S. to secure an annuity, the mortgage deed providing that S. might exercise the power of appointing a receiver under s. 24 of the Conveyancing Act, 1881, and, further, that the receiver might, if so directed in writing by S., "manage and carry on the business as he might think fit." H. continued to carry on the business from the date of the mortgage, and in doing so became indebted to the plaintiff for work done in connection with the business. The debt was unsecured, but it was arranged between H. and the plaintiff that H. should pay it off by fixed instalments. In June, 1891, after having paid some of the instalments, H. died leaving an executrix, and then, S.'s annuity being in arrear, S. by writing under the power conferred by the mortgage deed appointed a receiver of the business "with full power to manage and carry on the same as he might think fit." In August, 1891, the receiver paid the plaintiff a further instalment in reduction of his debt.

In a creditor's administration action commenced in July, 1897, by the plaintiff against H.'s executrix:—

Held, by the Court of Appeal (affirming Byrne J.), that the balance of the plaintiff's debt was not statute-barred, inasmuch as the receiver had, under the combined powers of s. 24 of the Conveyancing Act and of the mortgage deed, and also as agent for H.'s executrix, as he had been for H. himself (Conveyancing Act, 1881, s. 24, sub-s. 2), authority to continue paying the debt by instalments, and that there was, as incident to his authority, an implied promise that the balance should be paid out of H.'s assets.

Whether, if the case had rested solely upon the power of appointing a receiver under s. 24 of the Conveyancing Act, the receiver would have been justified in making a payment on account of the plaintiff's unsecured debt, *quære*. *In re* HALE. LILLEY *v.* FOAD - - C. A. 107

2. —— *"Clog" on Redemption—"Fetter"—Collateral Advantage—Presumption of Pressure on Mortgagor.*

A mortgagee may stipulate in his mortgage deed for a collateral advantage for himself beyond the repayment of the sum advanced and interest, and may enforce the bargain against his mortgagor, provided it is not unconscionable or oppressive; and there is no presumption, in the absence of evidence to the contrary, that the collateral advantage was given by the mortgagor under pressure.

A "clog" or "fetter" on a mortgagor's equity of redemption, explained.

Biggs v. *Hoddinott*, [1898] 2 Ch. 307, followed.

Decision of Byrne J., [1899] 1 Ch. 747, reversed. SANTLEY *v.* WILDE - C. A. 474

3. —— *General Charge—"All my Real and Personal Estate"—Uncertainty—Public Policy—Validity.*

A general charge for value on all the existing property of the mortgagor is not void for uncertainty if the property to which it attaches can be ascertained at the time of enforcement. Such a charge is not contrary to public policy. *In re* KELCEY. TYSON *v.* KELCEY
Kekewich J. 530

4. —— *Priority—Equitable Mortgage by Deposit of Deed—Subsequent Purchaser for Value without Notice—Negligence—Omission to require Production of Title-Deeds.*

In order that a purchaser for value, who has acquired the legal estate without notice of a

MORTGAGE—*continued.*
prior equitable mortgage of the property, may be postponed to that mortgage, it is not necessary to shew that he has been guilty of fraud, or negligence amounting to fraud; it is sufficient that he has been guilty of negligence so gross as to render it unjust to deprive the prior mortgagee of his priority.

Observations upon *Ratcliffe* v. *Barnard*, (1871) L. R. 6 Ch. 652, 654.

A purchaser, by an agent who was not a solicitor, purchased property and obtained a conveyance of the legal estate without notice of a prior equitable mortgage by deposit of the title-deeds. The agent inquired about the deeds, and was told by the vendor that they were in his possession, but that they would not be delivered up because they related also to other property. The agent did not ask for production of the deeds, and they were not produced, nor was any abstract of title delivered. By the conveyance to the purchaser the vendor acknowledged the right of the purchaser to production of the documents of title mentioned in a schedule, and to delivery of copies, and undertook for the safe custody thereof. The documents mentioned in the schedule were the deeds which had been deposited with the mortgagee. On the subsequent discovery of the mortgage :—

Held, that under the circumstances the mortgagee was entitled to priority over the purchaser.

Decision of Romer J. affirmed. OLIVER *v.* HINTON - - - - C. A. 264

5. —— *Tacking—Trustees—Joint Tenants—Further Advance—Second Mortgage.*

In October, 1864, certain property was mortgaged to A., B., and C., who were trustees, as joint tenants to secure 3000*l.* and interest.

In February, 1866, the same property was mortgaged to L. to secure 3500*l.* and interest.

In October, 1876, a further charge was executed in favour of the first mortgagees to secure 1500*l.* and interest.

A. died in May, 1883, and B. died in January, 1889. B., who was a solicitor, acted for all parties on the occasions of the creation of all three securities, and had actual notice of the second mortgage and of the further advance when they were created, but he failed to communicate the fact of the second advance to his co-mortgagees, and they had no personal knowledge of its existence at the date of the further advance :—

Held, that the plaintiffs, who were the successors in title as trustees of the first mortgagees, were not entitled to tack the amount due in respect of the further advance to the amount due on the first mortgage so as to postpone the defendants who represented the second mortgagee.

In the case of a mortgage of real estate to joint tenants to secure a debt due to them jointly, it cannot be said as against strangers that any one portion of the security or of the debt belongs to any one of the mortgagees : each is entitled to the whole ; and if notice of a second incumbrance is given to any one of them that creates an equity against one in respect of the whole sufficient to prevent any tacking. FREEMAN *v.* LAING Byrne J. 355

MORTGAGE—*continued.*
—— Equitable mortgage of shares in a company to secure debt—Foreclosure action after debt barred - - - 161
See LIMITATIONS, STATUTE OF. 2.

—— Payment by tenant for life—Presumption of intention to keep alive charge - 32
See TENANT FOR LIFE. 1.

—— Notice of trusts of mortgage money—Mortgagee not one of the original trustees—Objection—Sufficiency 340
See VENDOR AND PURCHASER. 5.

MORTMAIN—Possession by executor—Executor not express trustee for next of kin—Title—Statute of Limitations - 149
See CHARITY.

MOTION—Interlocutory — Evidence — Information and belief—Insufficient affidavit 50
See PRACTICE. 2.

NEGLIGENCE—Director—Duty of—Misfeasance
See COMPANY. 7. 629

—— Letting loose water confined in mine by cutting drifts—Damage - 233, n.
See MINE. 2.

—— Title-deeds—Omission to require production—Purchaser for value without notice—Equitable mortgage—Priority - 264
See MORTGAGE. 4.

NEWSPAPER—Reports of public speeches—"Author" - - - - 749
See COPYRIGHT.

NOTICE—Deceased member—Registered address—Forfeiture of shares - - 40
See COMPANY. 6.

—— Street—Alteration of scheme — Justices—Discretion - - - - 603
See LOCAL GOVERNMENT. 2.

—— Trusts of mortgage money—Mortgagee not one of the original trustees—Title — Objection—Sufficiency - - 340
See VENDOR AND PURCHASER. 5.

—— Waiver—Lease—Option of purchase—"Assigns"—Equitable assignees — Possession - - - - - 261
See LANDLORD AND TENANT. 1.

NUISANCE—Gas company—Statutory powers—Excavation—Injunction - - 217
See SUPPORT

—— Prescriptive right in third parties to drain into sewers—Powers of sanitary authority - - - - - 378
See LOCAL GOVERNMENT. 1.

OFFICIAL RECEIVER — Disputing finding in official receiver's further report—Evidence—Winding-up of company - 773
See COMPANY. 16.

—— Petition by—Public examination—Winding-up of company - - - 204
See COMPANY. 15.

OPTION OF PURCHASE—Notice — Waiver — Lease—"Assigns"—Equitable assignees—Possession - - - 261
See LANDLORD AND TENANT. 1.

ORIGINATING SUMMONS—Costs—Instructions for brief—Trial of issue of fact before judge - - - - 599
See COMPANY. 13.

OWNERSHIP—Act of—Declaration of deceased person against interest - - 121
See EVIDENCE.

PARCELS—Lease—Right of way—Misdescription—Common mistake—Rectification
See LANDLORD AND TENANT. 2. 309

PARISH COUNCIL—*Right to Sue—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 8, *sub-s.* 1 (*e*), (*i*).

A parish council cannot in their own name without the Attorney-General maintain an action to enforce a right of the inhabitants of the parish to the use of a well or spring of water. STOKE PARISH COUNCIL *v.* PRICE - - North J. 277

PARTIES—Misjoinder—Joint cause of action—Practice - - - - 696
See TRADE UNION. 3.

PATENT—*Joint Grant—Survivorship—Covenant by Joint Owners—When construed as Several or Joint and Several.*

In 1882 letters patent were granted to L. and J. in the then usual form of grant to two patentees, namely, to them, "their executors, administrators, and assigns," to the end that L. and J., "their executors, administrators, and assigns and every of them" should have and enjoy the full benefit and sole use and exercise of the patented invention. By an agreement under seal made in 1883 between L. and J. of the one part and the plaintiff company of the other part, the former agreed to sell to the latter the above-mentioned and other letters patent and patent rights, and it was provided that L. and J. should transfer to and vest the patents in the company. Clause 7 was as follows: "The assignment and transfer of the said letters patent . . . . shall be prepared by and at the costs of the said company, and shall be expressed to be made in pursuance of this agreement and in consideration of the payment of" the purchase-money, "and the said vendors and all other necessary parties, if any, shall at the cost of the said company execute such assignments to the said company, or as they shall direct, and such assignments respectively shall contain a covenant by the said vendors that all the letters patent thereby assigned . . . . are valid and in nowise void or voidable, and also such other covenants and provisions as may reasonably be required by the said company for giving effect to the sale hereby agreed to be made." L. died in 1888, and after his death an action was brought by the company against J. and the administratrix of L., claiming (1.) that the defendants might be ordered to assign the patents; (2.) damages for breach of the agreement and the warranty therein contained; (3.) repayment of part of the purchase-money on the ground that some of the patents had been declared invalid:—

Held, that the right or privilege granted by letters patent being for all purposes regarded as property, and the grant being to two persons, their executors, administrators, and assigns, only a joint interest was created, that J. took the whole interest by survivorship, and that L.'s administratrix was not a proper party to the action so far as it sought an assignment of the patent:

Held, also, that the obligation created by clause 7 of the agreement was that the assignment should contain a joint covenant only, and that L.'s administratrix was not bound to enter into any covenant. NATIONAL SOCIETY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS *v.* GIBBS - Cozens-Hardy J. 289

PAVING—Street—Expenses—Apportionment—Alteration of scheme - - 603
See LOCAL GOVERNMENT. 2.

PAYMENT INTO COURT—Denial of liability—Satisfaction—Admission of plaintiff's claim—Striking out counter-claim 93
See PRACTICE. 3.

PAYMENTS—Appropriation of—Banking account—Application of rule in *Clayton's Case* - - - - - 556
See BANKER.

—— Interest on shares—Ultra vires—New rules—Known insolvency at time of passing
See BUILDING SOCIETY. 1, 2. 60, 64, n.

PERPETUITY—Rule against—Title—Reverter—Common law condition—Shifting use
See VENDOR AND PURCHASER. 7. 540

PITCH—Stratum of—Surface—Subsidence—Right of support - - - 217
See SUPPORT; TRINIDAD.

POWER—*Execution—Limited Power—Exercise by Will—General Words of Appointment—General Powers—No Reference to Limited Power—Intention.*

A testatrix had two general powers of appointment in addition to a limited power to appoint the income of certain property to her husband for life. By her will, which contained no reference to the limited power or to the property subject thereto, she gave, devised, and bequeathed all her real and personal estate, and appointed all real and personal estate over which she might have a power of appointment unto her husband absolutely:—

Held, that the testatrix had clearly expressed her intention of exercising every power she had in favour of her husband, and that the limited power was therefore exercised. *In re* SHARLAND. *In re* REW. REW *v.* WIPPELL Kekewich J. 536

PRACTICE—*Costs—Appeal as to—Trustee—"Costs, Charges and Expenses"—Discretion of Judge—Leave to Appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Rules of Supreme Court*, 1883, *Order* XLV., *r.* 1.

Where costs are in the discretion of the judge, the Court of Appeal will assume that he has exercised his discretion as to them and will not entertain an appeal, unless it is satisfied that he has not exercised his discretion but has applied some rule which he considered as excluding it.

The City of Manchester, (1880) 5 P. D. 221, followed.

Charles v. *Jones*, (1886) 33 Ch. D. 80, not followed.

An appeal from an order for payment of

PRACTICE—*continued.*

"costs, charges and expenses" will not lie as to "costs" only, if the order is right as to "charges and expenses."

Charles v. *Jones*, 33 Ch. D. 80, followed on this point.

In re Chennell, (1878) 8 Ch. D. 492, not followed. BEW *v.* BEW - - - C. A. 467

2. —— *Evidence—Interlocutory Motion—Information and Belief—Insufficient Affidavit—Rules of Supreme Court*, 1883, *Order* XXXVIII., *r.* 3.

An affidavit of information and belief founded on statements made to the deponent by an informant, who declined to repeat them on affidavit unless subpœnaed, was not admitted on an interlocutory motion, in a case where the informant might have been but was not subpœnaed, and no irremediable injury could result from the exclusion of the evidence. *In re* ANTHONY BIRRELL PEARCE & CO. DOIG *v.* ANTHONY BIRRELL PEARCE & CO. *In re* SAME. GROOS *v.* SAME Kekewich J. 50

3. —— *Payment into Court—Satisfaction—Admission of Plaintiff's Claim—Striking out Counter-claim—Action—Damages—Injunction—Defence—Denial of Liability—Rules of Supreme Court*, 1883, *Order* XXII., *rr.* 1, 6.

A landowner brought an action claiming damages for trespass, and also an injunction. The defendant put in a defence and counter-claim alleging a right by custom to go on the land, and, under Rules of the Supreme Court, 1883, Order XXII., r. 1, with his defence, though denying liability, paid a sum into court by way of satisfaction of his liability, if any, in respect of the matters complained of. Under rule 6 the plaintiff took the money out on notice to the defendant that he accepted it "in satisfaction of the claim in respect of which it is paid in."

On an application by the plaintiff to strike out the counter-claim on the ground that the defendant had by his payment into court, followed by the plaintiff's acceptance, admitted the plaintiff's entire cause of action:—

Held, by the Court of Appeal (affirming the decision of Stirling J.), that there had been no such admission by the defendant as to preclude him from prosecuting his counter-claim setting up the custom, nor (*semble*) such acceptance in satisfaction by the plaintiff as to preclude him from prosecuting his claim for an injunction, the payment into court being by rule 1 confined to the plaintiff's claim for damages only. COOTE *v.* FORD - - - - - C. A. 93

—— Parish council—Right to sue - - 277
See PARISH COUNCIL.

—— Parties—Misjoinder—Joint cause of action
See TRADE UNION. 3. 696

PREFERENCE — Fraudulent — Preference for conscience's sake - - - 725
See COMPANY. 14.

PRESCRIPTION —Nuisance — Injunction — Prescriptive right in third parties to drain into sewers - - - - 378
See LOCAL GOVERNMENT. 1.

PRESUMPTION—Intention to keep alive charge —Payment by tenant for life - 32
See TENANT FOR LIFE. 1.

PRIORITY—Equitable mortgage—Purchaser for value without notice—Omission to require production of title-deeds - 264
See MORTGAGE. 4.

PRIVATE STREET WORKS ACT—Improvements —Charge on premises—Date — Incumbrance - - - - 496
See LOCAL GOVERNMENT. 3.

PROBATE—Married woman—Invalid bequest—Grant of general probate to husband —Implied assent to will - - - 1
See HUSBAND AND WIFE. 1.

PRODUCTION OF DOCUMENTS — Omission to require — Title-deeds — Purchaser for value without notice—Equitable mortgage—Priority - - - - 264
See MORTGAGE. 4.

PROMOTER—Sale by directors in one character to themselves in another — Voidable contract—Rescission—Damages - 392
See COMPANY. 8.

PROOF — Onus of—Heirlooms—Sale—Extravagance of tenant for life—Discretion of Court - - - - 679
See SETTLED LAND. 2.

—— Provable Debt — Costs — Unliquidated Damages - - - - - 7
See COMPANY. 17.

PROSPECTUS—Directors' liability — Action by shareholder for compensation in respect of untrue statement in prospectus 523
See LIMITATIONS, STATUTE OF. 1.

PUBLIC HEALTH — Private street — Improvements — Charge on premises — Date—Incumbrance—Vendor and purchaser
See LOCAL GOVERNMENT. 3. 496

—— Public well—Licence to take water from—Urban district council—Injunction 360
See RIPARIAN OWNER. 2.

—— Sewers—Prescriptive right in third parties to drain into sewers—Powers of sanitary authority - - - - 378
See LOCAL GOVERNMENT. 1.

—— Stream—Alteration of flow—Local authority —"Injuriously affecting" — Injunction
See RIPARIAN OWNER. 1. 608

PUBLIC POLICY — General charge—"All my real and personal estate"—Uncertainty —Validity - - - - 530
See MORTGAGE. 3.

PURCHASE—Option of — Lease—"Assigns"—Equitable assignees — Possession — Notice—Waiver - - - 261
See LANDLORD AND TENANT. 1.

PURCHASER
See Cases under VENDOR AND PURCHASER.

PURCHASER FOR VALUE WITHOUT NOTICE —Omission to require production of title-deeds — Equitable Mortgage — Priority - - - - 264
See MORTGAGE. 4.

QUICKSAND—Surface — Subsidence — Right of Support—Working stratum of pitch 217
See SUPPORT.

RATIFICATION — Marriage settlement—Infant Wife - - - - - 569
See SETTLEMENT. 1.

REASONABLENESS — Evidence — Inadmissibility—Restraint of trade—Contract 13
See MASTER AND SERVANT.

RECEIVER—Debt—Part payment by receiver—Inference of promise to pay—Statute of Limitations - - - 107
See MORTGAGE. 1.

—— Disputing finding in official receiver's further report — Evidence — Winding-up of company - - - 773
See COMPANY. 16.

—— Official—Petition by—Public examination—Winding-up of company - 204
See COMPANY. 15.

RECONSTRUCTION — Appropriation by new company of unclaimed shares—Rights of shareholder of old company - 616
See COMPANY. 9.

—— Of company—Shares partly paid up—Registration of contract - - - 370
See COMPANY. 10.

RECTIFICATION —Lease — Parcels—Right of way—Misdescription—Common mistake
See LANDLORD AND TENANT. 2. 309

—— Marriage settlement—Infant wife - 569
See SETTLEMENT. 1.

—— Register—Winding-up—Debts and liabilities incurred before — Costs incurred after—Proof - - - 7
See COMPANY. 17.

—— Settlement—Husband and wife—Solicitor and client—Fiduciary relation—Benefit to relative of solicitor - - 578
See SETTLEMENT. 2.

REDEMPTION—Clog on—Collateral advantage—Presumption of pressure on mortgagor
See MORTGAGE. 2. 474

REDROCK—Reservation from grant — Redrock and coal neither having any commercial value—Injunction - - - 190
See MINE. 1.

REGISTER— Rectification—Winding-up—Debts and liabilities incurred before — Costs incurred after—Proof - - 7
See COMPANY. 17.

REGISTRATION—Contract — Reconstruction of company—Shares partly paid up 370
See COMPANY. 10.

REMAINDERMAN—Payment by tenant for life of charge—Presumption of intention to keep alive charge - - - 32
See TENANT FOR LIFE. 1.

REMOTENESS—Will—Vesting—Maintenance—Intestacy - - - - 739
See WILL. 3.

RENT — Liability to pay rent and perform covenants — Leaseholds — Specific bequest - - - - - 54
See TENANT FOR LIFE. 2.

RENT-CHARGE — *Apportionment — Acreage or value—Grant of Land subject to Rent-charge—*

RENT-CHARGE—*continued.*

Grant or Reservation—Eviction of Grantee from Part of Land.

In 1840 A. by deed granted to B. certain land to the use that A. and his heirs should for ever receive thereout a certain rent-charge, "and subject and charged as aforesaid" to dower uses in favour of B.; and by the same deed B. granted to A. in fee the same rent-charge out of the land thereby granted. In 1898 B.'s successors in title were evicted from part of the land by title paramount, and thereupon claimed an apportionment of the rent-charge; but A.'s successor in title contended that the rent-charge was payable in full out of the remainder of the land:—

Held, that the deed operated as a reservation of the rent-charge in the first instance to A. in fee; that the subsequent grant by B. to A. in fee of the same rent-charge was inoperative; and that the rent-charge must be apportioned according to the value of the land. HARTLEY *v.* MADDOCKS - - - **Cozens-Hardy J. 199**

REPAIRS — Leaseholds — Specific bequest — Liability to pay rent and perform covenants - - - - 54
See TENANT FOR LIFE. 2.

REPUDIATION — By purchaser — Purchase-money payable by instalments—Right of vendor to retain instalments paid
See VENDOR AND PURCHASER. 4. 710

RESCISSION—Right to obtain—Undisclosed restrictive covenants—Form of conveyance
See VENDOR AND PURCHASER. 6. 515

—— Sale by directors in one character to themselves in another—Voidable contract—Damages - - - - 392
See COMPANY. 8.

RESERVATION—From grant—Redrock and coal neither having any commercial value — Injunction - - - - 190
See MINE. 1.

—— Grant or—Eviction of grantee from part of land—Apportionment of rent-charge—Acreage or value - - 199
See RENT-CHARGE.

RESTRAINT OF TRADE—Contract —Evidence of reasonableness inadmissible - 13
See MASTER AND SERVANT.

RESTRAINT ON ANTICIPATION — Married woman — Bankruptcy of — Separate estate — Death of husband — Title of trustee in bankruptcy - - 717
See HUSBAND AND WIFE. 2.

RESULTING TRUST — Dissolution of trade union—Unexpended funds - 184
See TRADE UNION. 1.

REVENUE—*Estate Duty—Incidence—Settlement Estate Duty—Settlement not made by Will but by Antecedent Instrument — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19.

By the marriage settlement of his daughter in 1895 a testator covenanted for the payment of 25,000*l.* to the trustees thereof within six calendar months after his decease "without any deduction." By his will he directed his

REVENUE—*continued.*
trustees and executors to pay the 25,000*l.* to the trustees of the settlement:—
Held, that the obligation imposed upon the testator's estate by the covenant was fully performed when the sum of 25,000*l.* was paid to the trustees of the settlement without any deduction in respect of estate duty, and that the settlement estate duty was payable out of the 25,000*l.*, and not out of the testator's general residuary estate. *In re* MARYON-WILSON. WILSON *v.* MARYON-WILSON. - - **Kekewich J. 489**

REVERSIONARY INTEREST—Absolute gift subject to executory limitation—Conversion—Enjoyment in specie - - **336**
See WILL. 2.

REVERTER—Common law condition—Shifting use—Rule against perpetuities - **540**
See VENDOR AND PURCHASER. 7.

RIGHT OF WAY—Lease—Parcels—Misdescription—Common mistake—Rectification
See LANDLORD AND TENANT. 2. **309**

RIPARIAN OWNER — *Alteration of Flow of Stream—Local Authority—"Injuriously Affecting"—Injunction — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 332.
Under s. 51 of the Public Health Act, 1875, a local authority have no power, for the purpose of supplying water to their district, to alter the flow of water in a stream without the consent in writing of the riparian proprietors lower down the stream, as required by s. 332 of the Act.
By so altering the flow of water the local authority are, within the meaning of s. 332, "injuriously affecting" the common law right of such a riparian proprietor, and they will be restrained from so doing without any proof of sensible damage caused to him.
Decision of Kekewich J., [1899] 1 Ch. 583, affirmed. ROBERTS *v.* GWYRFAI DISTRICT COUNCIL **C. A. 608**

2. —— *Alteration of Natural Flow—Spring—Flowing Water — Defined Channel — Artificial Channel—Injunction—Public Well—Urban District Council — Licence to take Water — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55).
In an action by a riparian owner and his tenant, the occupier of a mill on the banks of a stream, against a licensee from an urban district council, who were in possession of the land upon which the spring rose, to restrain the defendant from taking water from the spring and from interfering with the accustomed flow of water in the said stream, the defendant contended that he was entitled to abstract the water before it had risen to the surface, or flowed in a defined channel:—
Held, following *Dudden* v. *Clutton Union*, (1857) 1 H. & N. 627, that the defendant was not entitled to diminish or interfere with the natural flow of the water at its source, and that the principle of that decision was not affected by the fact that at some remote period the source of the spring had been built round, and formed into a polygonal well in order to improve its mode of issuing from the earth, thus making an artificial channel for a short distance.
A local authority has no power under the

RIPARIAN OWNER—*continued.*
Public Health Act, 1875, to license a stranger to take water from a public well for commercial purposes. MOSTYN *v.* ATHERTON **Byrne J. 360**

RULES OF SUPREME COURT, Order XVI., r. 1—*Parties* - - - - **696**
See TRADE UNION. 3.

—— **Order XXII., rr. 1, 6**—*Payment into and out of Court* - - - - **93**
See PRACTICE. 3.

—— **Order XXXVIII., r. 3**—*Affidavits and Depositions* - - - - **50**
See PRACTICE. 2.

—— **Order LVIII., r. 15**—*Appeals to the Court of Appeal* - - - - **773**
See COMPANY. 16.

—— **Order LXV., r. 1**—*Costs* - - **467**
See PRACTICE. 1.

—— **Order LXXI., r. 1a, Appendix N, items 81, 82, 82a**—*Interpretation of Terms* **599**
See COMPANY. 13.

SALE—Business — Injunction — Debentures — Floating charge - - - **130**
See COMPANY. 5.

——— Heirlooms—Discretion of Court—Extravagance of tenant for life **679, 691, n.**
See SETTLED LAND. 2, 3.

SANITARY AUTHORITY—Sewers—Prescriptive right in third parties to drain into sewers - - - - **378**
See LOCAL GOVERNMENT. 1.

SATISFACTION—Payment into court—Denial of liability—Admission of plaintiff's claim—Striking out counter-claim - **93**
See PRACTICE. 3.

SEASHORE—*Foreshore—Crown Lease — Injunction—Limits of Public User.*
The plaintiffs were the local authority of L., and the seashore at L. between high and low water-mark was vested in them under a lease from the Crown. W., a clergyman of the Church of England, held services and delivered addresses on the seashore without the consent of the plaintiffs, and asserted that the seashore was a highway and that he had a right to do so. The plaintiffs brought an action against W., claiming a declaration that he was not entitled to hold services, &c., on the seashore without their consent, and an injunction to restrain him from so doing. There was no evidence that the acts of W. caused an obstruction or led to a breach of the peace; nor did W. adduce any evidence of a prescriptive right or custom in support of his contention:—
Held, that the plaintiffs were entitled to the declaration for which they asked; but that the matter was too trivial for an injunction, which must be refused.
Blundell v. *Catterall*, (1821) 5 B. & Al. 268, followed. LLANDUDNO URBAN COUNCIL *v.* WOODS **Cozens-Hardy J. 705**

SERVANT — Restraint of trade — Evidence of reasonableness inadmissible—Contract
See MASTER AND SERVANT. **13**

SETTLED ESTATE.
See SETTLED LAND.

SETTLED LAND—*Ecclesiastical Land*—"*Settlement*"—"*Succession*"—*Land granted by Bishop to Grantee for Life, but during his Tenure of an Ecclesiastical Office — Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1.

Some houses in a cathedral city had from time immemorial been granted by the bishop of the diocese for the time being to one of the ecclesiastical dignitaries, for his life. The deed of grant was called a "collation," and the grantee was "inducted" by the registrar of the diocese into possession of the property.

By the last deed of collation the bishop granted the houses to the then archdeacon of the city for his life, but so long only as he should continue to be archdeacon. On the deed was indorsed a certificate signed by the registrar that five days after the date of the deed the grantee was duly inducted by him into the actual corporal possession of the property. Upon a summons by the archdeacon, with the approval of the bishop, asking that trustees might be appointed for the purposes of the Settled Land Act of the settlement created by the deed, the object being that the archdeacon, as tenant for life, or having the powers of a tenant for life under the Act, might sell the houses, and that the proceeds of sale might be invested in the names of trustees, and the income thereof paid to the persons who would have been from time to time entitled to the rents of the houses if unsold:—

Held, that this being ecclesiastical property, the Settled Land Act did not apply to it.

The application was accordingly refused.

Observations of Stirling J. in *Ex parte Vicar of Castle Bytham*, [1895] 1 Ch. 348, approved and adopted. *In re* BISHOP OF BATH AND WELLS **North J. 138**

2. —— *Heirlooms—Sale — Onus of Proof — Tenant for Life, Extravagance of—Remaindermen, Wishes of—Settlor, Intention of—Discretion of Court—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 37—*Appeal—Hearing before Two Judges—Supreme Court of Judicature Act*, 1899 (62 & 63 *Vict. c.* 6).

A tenant for life applying to the Court under s. 37 of the Settled Land Act, 1882, for leave to sell heirlooms with a view to obtaining an increased income, must shew that the proposed sale is in the interests of all parties entitled under the settlement, and the fact of his having got himself into difficulties by his own extravagance is not a circumstance which will have any weight with the Court in favour of a sale.

If the application is for leave to sell an heirloom of unique character and historical repute, such as a famous jewel or work of art, the Court, in the exercise of the judicial discretion given to it by the Act, will have regard to the intention of the settlor and also to the wishes and feelings of the remaindermen.

Decision of Byrne J. affirmed on appeal before two judges of the Court of Appeal under the Supreme Court of Judicature Act, 1899.

Decision of Chitty J. in *In re Hope's Settlement*, [1899] 2 Ch. 691, n., approved of. *In re* HOPE. DE CETTO *v.* HOPE - - **C. A. 679**

SETTLED LAND—*continued.*

3. —— *Heirlooms—Sale—Discretion of Court—Tenant for Life, Extravagance of.*

In re HOPE'S SETTLEMENT **Chitty J. 691, n.**

4. —— *Minerals—Lease—Open or Unopened Mine—Pieces of Land separated by narrow Strip belonging to different Owner—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 4.

An estate settled by the will of a testator comprised two pieces of land separated by a narrow intervening strip of land which belonged to different owners. Under the whole of the lands there was a valuable seam of coal. The piece of land on the north side of the strip had been demised by the settlor to a colliery company, who had worked the coal. The piece of land on the south side of the strip had not been demised by the settlor, nor had the coal thereunder been worked in any way; but it appeared that if the intervening strip had belonged to the testator the coal could have been worked from the pit or shaft sunk by the colliery company. On a petition by the tenant for life under the will for the sanction of the Court, under the Settled Estates Act, 1877, to a proposed mining lease of a portion of the land on the south side of the strip:—

Held, that, by reason of the intervention of the strip of land, the mine to be leased must be deemed to be a separate unopened mine, and that therefore three-fourths of the rent under the lease must be set aside and invested. *In re* MAYNARD'S SETTLED ESTATE **Kekewich J. 347**

—— Glebe lands—Sale by vicar—Purchase by trustee of settled estate — Successive tenants for life—Charge on trust estate—Vendor's lien - - - **729**
See VENDOR AND PURCHASER. 3.

SETTLEMENT—*Covenant to settle Wife's after-acquired Personalty—Ratification — Repudiation—Rectification — Marriage Settlement—Wife an Irishwoman under Age — Husband a domiciled Austrian—Austrian Law—Application of English Law.*

In 1864 an Irish lady, aged eighteen, married an Austrian at Bern. By the marriage articles, which were in English form and were executed at the British Embassy at Bern, the husband covenanted that all the after-acquired personal property of the wife (except pecuniary legacies) should be settled upon usual trusts for the wife for life, with a restraint on anticipation, and the children of the marriage. In 1867 the wife attained her majority. In 1870 she became entitled, on the death of her mother, to a sum of 6000*l.*, which was paid to the trustees of the marriage articles. In 1880 the wife and her husband, whilst in Paris, executed a deed in English form by which the 6000*l.* was settled upon the trusts of the marriage articles. This deed contained a covenant to settle all the after-acquired personal property of the wife, including pecuniary legacies. In 1884 she became entitled, on compromising an action, to a sum of 5000*l.*; and in January, 1893, she became entitled to a legacy of 2000*l.* Soon after she was informed for the first time that the 5000*l.* and the legacy must be paid to the trustees of her marriage settlement. In November, 1893, she and her

SETTLEMENT—*continued.*

husband, under legal advice, executed in Austria a notarial act, whereby they purported to annul the settlement created by the marriage articles and deed of 1880, and to vest in her an absolute control over all her property, which by Austrian law it was competent for them to do. In 1896 the lady and her husband brought an action against the trustees of her marriage settlement, and claimed a declaration that the settlement created by the marriage articles and the deed of 1880 had been annulled and were void by Austrian law; alternatively, they asked for rectification of the deed of 1880 so far as it went beyond the marriage articles, and contended that, in any event, the lady was entitled to repudiate the settlement so far as the 5000*l.* and legacy were concerned:—

Held, following *Van Grutten* v. *Digby*, (1862) 31 Beav. 561, that the marriage articles were valid and were governed by English law:

Held, also, following *Edwards* v. *Carter*, [1893] A. C. 360, that the lady, not having repudiated the marriage articles within a reasonable time after she attained twenty-one, was absolutely bound thereby, and that it was not competent for her to elect from time to time during coverture as property fell in whether or not she would affirm it, and consequently that the 5000*l.* was bound by the settlement.

Smith v. *Lucas*, (1881) 18 Ch. D. 531, not followed; and *Cooper* v. *Cooper*, (1888) 13 App. Cas. 88, distinguished.

Held, also, that if ratification were necessary, there had been ample ratification:

Held, further, that the deed of 1880 must be rectified so as expressly to exclude pecuniary legacies, and therefore that the legacy of 2000*l.* was not bound by the settlement. VIDITZ *v.* O'HAGAN - - - **Cozens-Hardy J. 569**

2. —— *Rectification—Husband and Wife—Solicitor and Client—Fiduciary Relation—Benefit to Relative of Solicitor.*

The relation of husband and wife is not one of those relations to which the doctrine of *Huguenin* v. *Baseley*, (1807) 14 Ves. 273, applies; and there is therefore no presumption that a voluntary deed executed by a wife in favour of her husband and prepared by the husband's solicitor is invalid, but the onus probandi lies on the person who impugns the instrument and not on the person who supports it.

Nedby v. *Nedby*, (1852) 5 De G. & Sm. 377, followed.

Where the benefit taken by the husband was in effect the release of a general power of appointment by the wife under an existing post-nuptial settlement of property which had not belonged to the wife:—

Held, that the fact that this release in the result accelerated the benefit taken under the settlement by a son of the solicitor did not invalidate the release. BARRON *v.* WILLIS **Cozens-Hardy J. 578**

—— Estate duty—Incidence—Settlement not made by will but by antecedent instrument - - - - - **489**
See REVENUE.

SETTLEMENT—*continued.*

—— "Succession"—Ecclesiastical land - **138**
See SETTLED LAND. 1.

SEVERANCE—Costs—Trustees—Allowance of two counsel—Taxation - - **588**
See TRUSTEE.

SEWERS—Prescriptive right in third parties to drain into sewers—Powers of sanitary authority - - - - **378**
See LOCAL GOVERNMENT. 1.

SHAREHOLDER.
See COMPANY.

SHARES.
See Cases under COMPANY.

—— Payment of interest on—Ultra vires—New rules—Known insolvency at time of passing - - - **60, 64**
See BUILDING SOCIETY. 1, 2.

SHIFTING USE—Reverter—Common law condition—Rule against perpetuities - **540**
See VENDOR AND PURCHASER. 7.

"SILT"—Surface—Subsidence—Right of support - - - - - **217**
See SUPPORT.

SOLICITOR—Fiduciary relation—Husband and wife—Solicitor and client—Benefit to relative of solicitor—Rectification of settlement - - - - **578**
See SETTLEMENT. 2.

SPECIFIC PERFORMANCE - - **710, 729**
See VENDOR AND PURCHASER. 3, 4.

SPEECHES — Newspaper — Reports of public speeches—"Author" - - **749**
See COPYRIGHT.

SPRING—Alteration of natural flow—Riparian owner—Injunction - - - **360**
See RIPARIAN OWNER. 2.

STATUTES:—

21 Jac. 1, c. 16, s. 3—*Limitations* - **629**
See COMPANY. 7.

—— —— - - - - - **107**
See MORTGAGE. 1.

29 Car. 2, c. 3, s. 4—*Statute of Frauds* - **73**
See VENDOR AND PURCHASER. 2.

57 Geo. 3, c. xxix., s. 80—*Michael Angelo Taylor's Act* - - - - **169**
See LONDON.

11 Geo. 4 and 1 Will. 4, c. 40—*Executors* **149**
See CHARITY.

3 & 4 Will. 4, c. 42, s. 3—*Limitations* - **523**
See LIMITATIONS, STATUTE OF. 1.

—— —— s. 5 - - - - **561**
See HUSBAND AND WIFE. 3.

5 & 6 Vict. c. 45, ss. 2, 3, 18—*Copyright* **749**
See COPYRIGHT.

10 & 11 Vict. c. 15, s. 29—*Gasworks Clauses* **217**
See SUPPORT.

16 & 17 Vict. c. 34, s. 40—*Income Tax* - **629**
See COMPANY. 7.

21 & 22 Vict. c. 27—*Lord Cairns' Act* - **217**
See SUPPORT.

23 & 24 Vict. c. 38, s. 13—*Law of Property* **149**
See CHARITY.

STATUTES—*continued.*

25 & 26 Vict. c. 89, ss. 9, 38—*Companies* 593
See COMPANY. 12.

—— —— ss. 16, 161, 162 - - 80
See COMPANY. 11.

—— —— s. 23 - - - - 302
See COMPANY. 1.

—— —— 35, 158 - - - - 7
See COMPANY. 17.

—— —— s. 161 - - - - 616
See COMPANY. 9.

—— —— s. 164 - - - - 725
See COMPANY. 14.

26 & 27 Vict. c. 112, ss. 10, 12, 13—*Telegraph*
See TELEPHONE COMPANY. 282

30 & 31 Vict. c. 131, s. 24, sub-s. 1—*Companies*
See COMPANY. 1. 302

—— —— s. 25 - - 207, 370, 480, 509
See COMPANY. 2, 3, 4, 10.

33 & 34 Vict. c. 78, ss. 28, 32—*Tramways* 282
See TELEPHONE COMPANY.

34 & 35 Vict. c. 41, s. 9—*Gasworks Clauses* 217
See SUPPORT.

36 & 37 Vict. c. 66, s. 49—*Judicature* - 467
See PRACTICE. 1.

37 & 38 Vict. c. 57—*Real Property Limitations*
See CHARITY. 149

37 & 38 Vict. c. 78, s. 9—*Vendors and Purchasers*
See VENDOR AND PURCHASER. 6. 515

38 & 39 Vict. c. 55—*Public Health* - 360
See RIPARIAN OWNER. 2.

—— —— ss. 21, 299 - - - 378
See LOCAL GOVERNMENT. 1.

—— —— s. 51, 332 - - - 608
See RIPARIAN OWNER.

—— —— ss. 150, 257 - - - 496
See LOCAL GOVERNMENT. 3.

38 & 39 Vict. c. 77, s. 10—*Judicature* - 7
See COMPANY. 17.

38 & 39 Vict. c. 86, s. 7—*Conspiracy, and Protection of Property* - - 35, 696
See TRADE UNION.

40 & 41 Vict. c. 18, s. 4—*Settled Estates* 347
See SETTLED LAND. 4.

44 & 45 Vict. c. 41, s. 24—*Conveyancing and Law of Property* - - - 107
See MORTGAGE. 1.

45 & 46 Vict. c. 38, s. 2, sub-s. 1—*Settled Land*
See SETTLED LAND. 1. 138

—— —— s. 37 - - - - 679
See SETTLED LAND. 2.

45 & 46 Vict. c. 75, s. 1, sub-s. 5; s. 19—*Married Women's Property* - - 717
See HUSBAND AND WIFE. 2.

46 & 47 Vict. c. 52, s. 37—*Bankruptcy* - 7
See COMPANY. 17.

—— —— s. 48 - - - - 725
See COMPANY. 14.

—— —— s. 152 - - - - 717
See HUSBAND AND WIFE. 2.

52 & 53 Vict. c. 49, Sched. I. (*c*)—*Arbitration*
See COMPANY. 11. 80

STATUTES—*continued.*

53 & 54 Vict. c. 63, s. 8—*Companies—Winding-up* - - - - 773
See COMPANY. 16.

—— —— ss. 8, 14 - - - 204
See COMPANY. 15.

—— —— s. 10 - - - - 629
See COMPANY. 7.

53 & 54 Vict. c. 64, s. 3—*Directors' Liability*
See LIMITATIONS, STATUTE OF. 523

55 & 56 Vict. c. 57, ss. 6, 7, 8, 11, 12, 13—*Private Street Works* - - 603
See LOCAL GOVERNMENT. 2.

—— —— s. 13 - - - - 496
See LOCAL GOVERNMENT. 3.

56 & 57 Vict. c. 73, s. 8, sub-s. 1 (*e*), (*i*)—*Local Government* - - - - 277
See PARISH COUNCIL.

57 & 58 Vict. c. 30, s. 5—*Finance Act* - 489
See REVENUE.

59 & 60 Vict. c. 28, s. 19—*Finance Act* - 489
See REVENUE.

61 & 62 Vict. c. 26—*Companies* - - 509
See COMPANY. 2.

62 & 63 Vict. c. 6—*Judicature* - - 679
See SETTLED LAND.

STREAM—Alteration of flow—Local authority—"Injuriously affecting"—Injunction 608
See RIPARIAN OWNER. 1.

STREETS—Paving, &c., expenses—Apportionment—Alteration of scheme—Notice—Justices—Discretion - - 603
See LOCAL GOVERNMENT. 2.

—— Private street—Improvements—Charge on premises—Date—Vendor and purchaser
See LOCAL GOVERNMENT. 3. 496

—— Widening—Compulsory powers—House—Taking whole—Part only required 169
See LONDON.

—— Wires—Right to lay—Power to open street—Consent of tramway company - 282
See TELEPHONE COMPANY.

STRIKE—"Watching or besetting"—Interlocutory injunction - - 35, 696
See TRADE UNION. 2, 3.

STRIKING OUT COUNTER-CLAIM—Payment into court—Denial of liability—Satisfaction—Admission of plaintiff's claim
See PRACTICE. 3. 93

SUBSIDENCE—Surface—Right of support—"Running silt"—Working stratum of pitch - - - - - 217
See SUPPORT.

SUCCESSION—"Settlement"—Ecclesiastical land - - - - - 138
See SETTLED LAND. 1.

SUPPORT—*Statutory Powers—Nuisance—Excavation—Landowner—Drainage—Surface, Letting down—Subsidence—Underground Water—Right of Support—Water-logged Land—Quicksand—"Running Silt"—Pitch, Stratum of—Ancient Lights, Interference with—Damages—Injunction—Gasworks Clauses Act*, 1847 (10 & 11 *Vict.* c. 15), s. 29—*Gasworks Clauses Act*, 1871 (34 & 35

SUPPORT—*continued.*

Vict. c. 41), *s.* 9—*Lord Cairns' Act* (21 *&* 22 *Vict. c.* 27).

The plaintiff was the owner of land with houses on it. The adjoining land belonged to the defendants, a gas company incorporated by special Act, with power to purchase land by agreement only, and subject to the provisions of the Gasworks Clauses Acts, 1847 and 1871. Under their statutory powers the defendants proceeded to excavate their land for the purpose of erecting a gasometer. In so doing they penetrated an underground stratum of quicksand, or sand loaded with stagnant water, geologically known as "running silt," which extended under the plaintiff's land as well as their own, the silt or sand largely preponderating over the water. In draining their excavation the defendants withdrew a large quantity of the running silt from under the plaintiff's land and thus caused a subsidence of the surface with consequent structural injury to his houses. The liability of the defendants to proceedings for any "nuisance" caused by them in the execution of their works was preserved by s. 9 of the Gasworks Clauses Act, 1871:—

Held, by the Court of Appeal (Lindley M.R., Rigby and Vaughan Williams L.JJ.), that the defendants had no statutory authority so to construct their works as to occasion a nuisance, the fact that s. 9 of the Gasworks Clauses Act, 1871, expressly preserved their liability for any nuisance distinguishing the case from *London, Brighton and South Coast Ry. Co.* v. *Truman*, (1885) 11 App. Cas. 45:

Held, also, by Lindley M.R. and Rigby L.J., that, on their view of the facts, the plaintiff's land was supported, not by a stratum of water, but by a bed of wet sand or running silt; and that, as the defendants had caused the subsidence of the plaintiff's land by withdrawing this support they had committed an actionable nuisance at common law entitling the plaintiff to damages: the decision in *Popplewell* v. *Hodkinson*, (1869) L. R. 4 Ex. 248, being inapplicable as dealing only with support by water:

But *held*, by Vaughan Williams L.J., that no nuisance giving a right of action had been proved, because, upon his view of the facts, the subsidence had been caused merely by the withdrawal, through the defendants' draining operations on their own land, of subterranean water-support of the plaintiff's land; and that, on principle, as well as on the authority of *Popplewell* v. *Hodkinson*, the withdrawal of subterranean water-support from a neighbour's land in the course of draining one's own land, even though it damages the neighbour's land, gives him no cause of action.

Decision of North J., [1898] 2 Ch. 614, affirmed.

The right of support for the surface of land by subterranean water, quicksand, or water-logged soil, discussed.

It being proved that the proposed gasometer would obstruct ancient lights in the plaintiff's houses:—

Held, by the Court of Appeal, that the plaintiff was entitled to an injunction to restrain the threatened infringement of his legal right, since it would not be adequately protected or vindicated by damages: *Martin* v. *Price*, [1894] 1 Ch. 276; *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287.

Popplewell v. *Hodkinson* held not applicable to a case in which subsidence of A.'s land had been caused by the working by B. on his own land of an underground stratum of natural pitch common to both lands. (See note at p. 260.) JORDESON *v.* SUTTON, SOUTHCOATES AND DRYPOOL GAS COMPANY - - - - C. A. 217

—— Pitch, stratum of—Letting down surface—Subsidence—Injunction - 260, n.
See TRINIDAD.

SURFACE—Letting down—Subsidence—Right of support—"Running silt" - 217
See SUPPORT.

SURVIVORSHIP—Class gift—Lapse—Period of distribution - - - - 314
See WILL. 1.

—— Joint grant—Covenant by joint owners—When construed as several or joint and several - - - - 289
See PATENT.

TACKING—Trustees—Joint tenants—Further advance—Second mortgage - 355
See MORTGAGE. 5.

TAXATION—Costs of severance—Trustees—Allowance of two counsel - 588
See TRUSTEE.

TELEGRAPH—Wires—Right to lay—Power to open street—Consent of tramway company - - - - - 282
See TELEPHONE COMPANY.

TELEPHONE COMPANY—*Public Street—Licence from Postmaster-General—Right to lay Wires—Power to open Street—Consent—Person liable for Repair—Tramway Company—Telegraph Act*, 1863 (26 *&* 27 *Vict. c.* 112), *ss.* 10, 12, 13—*Tramways Act*, 1870 (33 *&* 34 *Vict. c.* 78), *ss.* 28, 32.

A telephone company, acting under a licence from the Postmaster-General pursuant to the Telegraph Acts, 1863, 1878, and 1892, need not obtain the previous consent of a tramway company before proceeding to break open a street or public road on which tramway lines are laid for the purpose of laying telephone wires, even though the tramway company is liable for the repair of that street or public road. BRISTOL TRAMWAYS AND CARRIAGE COMPANY *v.* NATIONAL TELEPHONE COMPANY - North J. 282

TENANT FOR LIFE—*Payment by Tenant for Life of Charge on Inheritance—Reconveyance of Mortgaged Property—Presumption of Intention to keep alive Charge—Tenant for Life and Remainderman.*

A reversionary interest in trust funds was mortgaged by the reversioner. He afterwards on his marriage assigned the same interest (subject to the mortgage) to trustees, on trust for his wife for her life, with remainder to himself for his life, with remainders over. After the marriage he paid off the mortgage debt out of his own moneys, and the mortgagee executed a deed which purported to reconvey the mortgaged property to him "absolutely discharged from" the mortgage debt

TENANT FOR LIFE—*continued.*
and all claims under the mortgage deed. The solicitors who prepared the reconveyance were ignorant of the existence of the settlement.

In an action by the reversioner, claiming to have the reconveyance set aside or rectified, he gave evidence that he did not intend to pay off the mortgage debt for the benefit of the settlement, but that he intended to keep the charge alive for his own benefit:—

Held, that, notwithstanding the form of the reconveyance, the plaintiff was entitled to have the charge kept alive for his own benefit, and that the sum secured by the mortgage constituted a charge on the property having priority over the settlement, and a declaration was made to that effect. LORD GIFFORD *v.* LORD FITZHARDINGE North J. 32

2. —— *Repairs—Leaseholds—Specific Bequest—Liability to pay Rent and perform Covenants.*

A tenant for life of leaseholds, specifically bequeathed by the will of a testator who was assignee of the lease under which the property is held, is bound, during the continuance of her interest, as between herself and the testator's estate, to pay the rent reserved by the lease, and perform the covenants and conditions contained in it.

In re Betty, [1899] 1 Ch. 821, followed.

In re Tomlinson, [1898] 1 Ch. 232, not followed.

In re GJERS. COOPER *v.* GJERS Kekewich J. 54

—— Extravagance of tenant for life—Heirlooms—Sale—Discretion of Court 679, 691, n.
See SETTLED LAND. 2, 3.

—— Glebe—Purchase by trustee of settled estate—Successive tenants for life—Charge on trust estate—Vendor's lien - 729
See VENDOR AND PURCHASER. 3.

TIME—Application to discharge order for public examination—Delay - - 773
See COMPANY. 16.

—— For making award—Arbitrators "called on to act"—Notice to appoint umpire 80
See COMPANY. 11.

—— Restraint of trade—Contract—Evidence of reasonableness inadmissible - 13
See MASTER AND SERVANT.

TITLE—Notice of trusts of mortgage money—Mortgagee not one of the original trustees—Objection—Sufficiency - 340
See VENDOR AND PURCHASER. 5.

—— Practice — Summons — Jurisdiction — Contract—Validity - - - 515
See VENDOR AND PURCHASER. 6.

—— Reverter—Common law condition—Shifting use—Rule against perpetuities - 540
See VENDOR AND PURCHASER. 7.

TITLE-DEEDS—Omission to require production of—Negligence—Equitable mortgage—Purchaser for value without notice—Priority - - - - 264
See MORTGAGE. 4.

TRADE—Married woman, bankruptcy of—Separate estate—Restraint on anticipation—Death of husband—Title of trustee in bankruptcy - - - - 717
See HUSBAND AND WIFE. 2.

TRADE—*continued.*
—— Restraint of—Contract—Evidence of reasonableness inadmissible - - 13
See MASTER AND SERVANT.

TRADE UNION — *Dissolution — Unexpended Funds—Resulting Trust.*

A society was registered under the Trade Union Acts, 1871 and 1876, to raise funds by means of weekly contributions to defend and support its members in obtaining and maintaining reasonable remuneration for their labour. There were two classes of members—printers and transferrers—and by the rules of the society the printers subscribed twice as much as the transferrers, and were entitled to receive twice as much strike or lock-out pay; the scale of payments also varied with the length of time a member had belonged to the society. No provision was made by the rules for the distribution of the funds of the society on a dissolution. At the time of its dissolution the society consisted of 201 members, and its unexpended funds amounted to 1000*l.*, and the question now arose how this sum was to be distributed. The Attorney-General having been served, and making no claim to the fund as bona vacantia:—

Held, distinguishing *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, on this point, that there was a resulting trust in favour of those who had subscribed to the fund, and that the money was now divisible amongst the existing members at the time of the dissolution, in proportion to the amount contributed by each member to the funds of the society irrespective of fines, or payments made to members in accordance with the rules. *In re* PRINTERS AND TRANSFERRERS AMALGAMATED TRADES PROTECTION SOCIETY - Byrne J. 184

2. —— *Strike—"Watching or Besetting"—Interlocutory Injunction—Conspiracy, and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 7.

Watching or besetting a place where a person "resides, or works, or carries on business, or happens to be," under sub-s. 4 of s. 7 of the Conspiracy, and Protection of Property Act, 1875, does not necessarily imply any lengthened watching, and it extends to any place where a person is found, however casually.

During the pendency of a strike two agents of a trade union attended at a landing-stage to await the arrival of a steamer containing workmen imported by the masters from Ireland to replace the men on strike, and, on the arrival of the steamer, they informed the Irish workmen of the strike, and offered to pay their expenses if they would go elsewhere to work:—

Held, (1.) that the attendance at the landing-stage was with a view to compel the masters to conduct their business in accordance with the requirements of the men, and was not in order merely to communicate information; and (2.) that it was a watching or besetting within sub-s. 4 of s. 7 of the Conspiracy, and Protection of Property Act, 1875; and an interlocutory injunction was granted against the officers of the union. CHARNOCK *v.* COURT - - Stirling J. 35

3. —— *Strike—Watching and Besetting—Interlocutory Injunction—Conspiracy, and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86),

TRADE UNION—*continued.*

s. 7—Practice—Parties—Misjoinder—Joint Cause of Action—Rules of Supreme Court, Order XVI., r. 1.

In an action under s. 7 of the Conspiracy, and Protection of Property Act, 1875, brought by several members of an association of master builders at H., where there was a strike, against the officials of various trade unions there, the plaintiffs by their statement of claim alleged that the defendants, with the intention of compelling the plaintiffs and other members of the association to accept the terms of the unions, combined and conspired together to watch railway stations and other places where workmen imported by the association to replace the men on strike might happen to be, for the purpose of persuading those workmen not to work for the plaintiffs or any of them, or any other member of the association, and in furtherance of the said combination and conspiracy wrongfully did a series of overt acts therein specified for the purpose of persuading the workmen as aforesaid, by reason whereof the plaintiffs suffered damage:—

Held, (1) that the allegations in the statement of claim disclosed a joint cause of action, and that, even if it were not established that all the defendants had committed the acts complained of, judgment might be recovered against some or one of them; (2) that the plaintiffs could properly combine in bringing the action, inasmuch as the right to the relief claimed arose out of the same series of transactions, and there was a common question of fact as well as law whether all the acts complained of were done in pursuance of a combination so as to render the defendants jointly liable in respect of them.

Interlocutory injunction granted against two of the defendants. WALTERS *v.* GREEN
Stirling J. 696

TRAMWAY COMPANY—Consent of—Right to lay wires—Power to open street - 282
See TELEPHONE COMPANY.

TRINIDAD—"*Pitch Land*"—*Pitch, Stratum of—Letting down Surface—Subsidence—Right of Support—Injunction—Damages.*

The plaintiffs and defendants were respectively the owners of adjoining lots of "pitch land" in the island of Trinidad, containing, at a few feet below the surface, a natural stratum of asphaltum or pitch. The defendants proceeded to excavate their lot, including the pitch under it, the excavation being made close up to the boundary of the plaintiffs' lot, the result of which was that the edge of the stratum of pitch on that lot, being exposed to the heat of the atmosphere, began to melt. The pitch thus oozed out, and either fell into the defendants' excavation or was shaved off by them. The consequence of this abstraction of the pitch from the plaintiffs' lot was that the surface of it began to sink and crack.

Injunction granted with damages restraining the defendants from digging and winning or otherwise removing asphaltum from their lot in such a way as to destroy or seriously injure the surface of the plaintiffs' lot.

Popplewell v. *Hodkinson*, (1869) L. R. 4 Ex. 248, not applicable. TRINIDAD ASPHALT COMPANY *v.* AMBARD (and see full report, [1899] A. C. 594) - - - - P. C. 260, n.

TRUST—Resulting—Dissolution of trade union—Unexpended funds - - 184
See TRADE UNION. 1.

TRUSTEE—*Costs—Severance on Further Consideration—Administration—Defendant Trustees—Costs of Severance—Allowance of two Counsel—Taxation.*

On further consideration in an administration action a hostile order was sought against one of the defendant trustees. Thereupon the defendants severed, the trustee attacked appearing by two counsel and his co-trustee by one counsel. The attack failed, and the trustees were given their costs of the action as between solicitor and client, and also their costs of appearing separately. In taxing their costs the taxing master disallowed the costs of a leading counsel to the trustee attacked, being of opinion that one counsel for each trustee was sufficient. On summons to review:—

Held, that the trustee attacked was entitled to the costs of appearing by two counsel. *In re* MADDOCK. BUTT *v.* WRIGHT
Cozens-Hardy J. 588

—— Costs—Appeal as to—"Costs, charges and expenses"—Discretion of judge - 467
See PRACTICE. 1.

—— Executor not express trustee for next of kin—Title of heir-at-law and next of kin barred by Statute of Limitations
See CHARITY. 149

—— Tacking—Joint tenants—Further advance—Second mortgage - - 355
See MORTGAGE. 5.

—— Title—Notice of trusts of mortgage money—Mortgagee not one of the original trustees—Objection—Sufficiency 340
See VENDOR AND PURCHASER. 5.

ULTRA VIRES—New rules—Known insolvency at time of passing—Payment of interest on shares - - - - 60, 64, n.
See BUILDING SOCIETY. 1, 2.

—— Reconstruction — Scheme — Appropriation by new company of unclaimed shares
See COMPANY. 9. 616

UMPIRE — Notice to appoint — Arbitrators "called on to act"—Time for making award - - - - 80
See COMPANY. 11.

UNCERTAINTY—Charge—"All my real and personal estate" — Public policy — Validity - - - - 530
See MORTGAGE. 3.

UNION—Trade - - - - 35, 696
See TRADE UNION. 2, 3.

UNLIQUIDATED DAMAGES—Proof—Costs—Provable debt - - - 7
See COMPANY. 17.

USER—Foreshore—Crown lease—Injunction—Limits of public user - - 705
See SEASHORE.

VENDOR AND PURCHASER—*Contract for Sale —Leaseholds — Assignment — Lessor's Consent — Duty of Vendor—Default of Vendor in obtaining Consent—Loss of Bargain—Liability of Vendor—Damages.*

A purchaser of leasehold property, which the vendor cannot assign without a licence from his lessor, is entitled to damages (beyond return of the deposit, with interest and expenses) for loss of his bargain by reason of the vendor's omission to do his best to procure such licence.

A vendor agreed with a purchaser for the sale of a leasehold hotel, subject to the consent of the lessor being obtained to the assignment of the lease, and the purchaser paid a deposit on his purchase-money. The vendor died without having completed his contract, and the purchaser then brought an action against his legal personal representative for specific performance. The defendant, being desirous of freeing the vendor's estate from the action, induced the lessor to refuse his consent to the assignment, which the lessor accordingly did, and the purchaser thus lost his bargain. Thereupon the purchaser amended his action by claiming damages and return of the deposit:—

Held, that the plaintiff was entitled, not only to the return of his deposit, with interest and costs of investigating title, but also to the damages he had sustained by the loss of his bargain through the omission of the defendant to obtain the lessor's consent.

Bain v. *Fothergill*, (1874) L. R. 7 H. L. 158, considered.

Decision of Romer J. reversed. Day *v.* Singleton - - - - C. A. 320

2. —— *Deposit—Cheque for—Sale of Land by Auction—Refusal to accept highest Bidder—Custom —Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.

Defendants advertised a freehold public-house for sale by auction, under conditions providing that the highest bidder should be the purchaser, and that he should immediately after the sale pay to the auctioneer a deposit of 10 per cent. on the amount and in part payment of his purchase-money, and sign an agreement in the form annexed to the conditions, the form stating that the deposit had been paid. The plaintiff, a married woman with means at least sufficient to pay for the property, despatched her husband to bid for it. She did not, however, entrust him with the cash necessary to pay the deposit. The property was knocked down to him at 4900*l.* He had a banking account of his own (which, however, was not in credit to the amount of 490*l.*), and tendered his cheque for 490*l.*, the amount of the deposit. One of the vendors, however, recognised him as one who had recently openly sworn that he had nothing in the world except the clothes he stood up in, and on that vendor's instructions the cheque was refused; the husband was not allowed to sign the contract, although he protested that his wife "would find the money to-morrow" and that he was buying for her, and the property was sold to some one else at an enhanced price. The plaintiff thereupon sued the vendors for damages for breach of contract that the highest bidder should be the purchaser, and for refusing to allow the auctioneer to accept the cheque for the deposit, or to allow her husband to sign the contract. The Court found that if the cheque had been accepted the plaintiff would have provided funds to meet it.

VENDOR AND PURCHASER—*continued.*

Held, that a vendor who offered property for sale by auction, on the terms of printed conditions, could be made liable in damages to a person who accepted the offer and complied with the conditions if those conditions were violated by the vendor, and that the Statute of Frauds would be no defence: see *Warlow* v. *Harrison*, (1858) 1 E. & E. 295, 317; *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256:

But *held*, that no custom had been proved obliging a vendor to accept, in payment of a deposit, the cheque even of a person in credit, although such a course was usual; and that no such custom could bind a vendor to accept a cheque from a pauper; that the conditions meant that the deposit was to be paid in cash, and the vendors were not bound to wait till the next day for it or to sign the contract until this condition precedent had been performed. Johnston *v.* Boyes - - - - Cozens-Hardy J. 73

3. —— *Glebe Lands—Sale by a Vicar—Purchase by a Trustee of Settled Estate—Entry by Tenant for Life—Payment of Interest on Purchase-money — Non-payment of Principal — Successive Tenants for Life—Specific Performance—Charge on Trust Estate—Vendor's Lien.*

In 1873 a vicar, with the consent of the patron of the living and the approval of the plaintiffs, entered into a contract with the trustee of a settled estate, who had power to invest in the purchase of land, for the sale of the glebe lands of the vicarage under the Ecclesiastical Leasing Acts, 1842 and 1858; the plaintiffs and the tenant for life were also parties to and executed this contract. The title was accepted, and the tenant for life, with the approval of the trustee, entered into possession and paid the vicar interest on the purchase-money, 24,963*l.*, at 3½ per cent., and this payment was continued by successive tenants for life until 1896, when, the purchase-money being still unpaid, the plaintiffs commenced the present action against the present vicar, the present tenant for life, the legal personal representative of the trustee, and the present trustees of the settled estates, for specific performance of the contract and damages, or an account and a declaration that the plaintiffs were entitled to a lien on the lands, and enforcement thereof:—

Held, that the contract was not enforceable against any person or persons subsequently becoming entitled to the estate; that the vendors were not entitled, by subrogation or otherwise, to be placed in the same position as the trustee would have been in had he personally discharged his liability on the contract, nor could they claim payment out of any assets in the hands of the trustees liable to be laid out in land or distributed in payment of portions to the relief of the settled estate; and that they were entitled to nothing more than a vendor's lien on the land sold. Ecclesiastical Commissioners *v.* Pinney

Byrne J. 729

4. —— *Instalments—Purchase-money payable*

VENDOR AND PURCHASER—*continued.*

by—Repudiation by Purchaser—Right of Vendor to retain Instalments paid—Specific Performance.

The defendant in 1892 agreed with the plaintiff for the sale to the latter of land at the price of 150*l.*, of which the receipt of 40*l.* on account was acknowledged, the balance being payable by quarterly instalments of 9*l.* 3*s.* 4*d.* each. In case of default in payment of an instalment for thirty days all the unpaid instalments were to become immediately due and payable, and in default of payment the vendor was to have power to sell the land and retain the unpaid instalments with interest out of the proceeds, and was to pay the balance to the purchaser.

The plaintiff was in possession of the land for a considerable time, and, although generally in arrear with his instalments, he had in August, 1895, paid them all but one. No further payment was made, and in 1896 the plaintiff went away, the land being then of less value than the total amount of the instalments paid. The defendant, being unable to find the plaintiff, took possession of the land and advertised it for sale; but, being unable to effect a sale, he let the property in March, 1898, giving the tenant an option to purchase. After the tenant had built a house on the land the plaintiff returned, offered to pay the final instalment, and asked for a conveyance:—

Held, that the plaintiff's conduct amounted to repudiation of his contract, and that he was not entitled to specific performance, or damages, or the return of his instalments or a lien on the land.

Observations on *Palmer* v. *Temple*, (1839) 9 Ad. & E. 508. CORNWALL *v.* HENSON
Cozens-Hardy J. 710

5. —— *Title—Notice of Trusts of Mortgage Money—Mortgagee not one of the original Trustees—Joint Account Clause—Objection—Sufficiency.*

A contract was entered into for the sale of property which was subject to a mortgage to two persons. The mortgage deed contained the usual statement that the money belonged to the mortgagees on a joint account. By inadvertence it was disclosed to the purchasers that the mortgage money was held on the trusts of a settlement of which the mortgagees were not the original trustees:—

Held, that the purchasers were entitled to require that it should be shewn that the mortgagees were the duly appointed trustees of the settlement.

In re Harman and Uxbridge and Rickmansworth Ry. Co., (1883) 24 Ch. D. 720, distinguished. *In re* BLAIBERG AND ABRAHAMS
Kekewich J. 340

6. —— *Title—Practice—Summons—Jurisdiction—Contract—Validity—Mistake—Rescission—Right to obtain—Undisclosed Restrictive Covenants — Form of Conveyance — Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.

A general declaration as to title ought rarely to be made on a vendor and purchaser summons, that procedure being only intended for the decision of isolated points arising out of or connected with the contract.

Criticism of the existing practice in this respect.

VENDOR AND PURCHASER—*continued.*

An isolated point on the form of the conveyance may be dealt with on a vendor and purchaser summons, although the respondent may have a right to obtain rescission of the contract on the ground of mistake. Such a right to obtain rescission does not give rise to "a question affecting the existence or validity of the contract" within the meaning of the Vendor and Purchaser Act, 1874, s. 9.

A purchaser is entitled to a conveyance subject only to the restrictive covenants mentioned in the contract, although he has notice of others. *In re* WALLIS AND BARNARD'S CONTRACT
Kekewich J. 515

7. —— *Title—Reverter—Common Law Condition—Shifting Use—Rule against Perpetuities.*

In October, 1898, a contract was entered into on behalf of the present trustees of Hollis' Hospital for the sale of certain freehold property belonging to the hospital.

The property contracted to be sold formed part of certain property which had been conveyed by H. to trustees upon trust for the hospital by deeds of lease and release dated May 17 and 18, 1726. The release contained a proviso that if at any time thereafter the premises thereby conveyed or any part thereof, or the rents, issues, and profits of the same or of any part thereof, should be employed or converted to or for any other uses, intents, or purposes than those thereinbefore mentioned, then and from thenceforth all and every the premises thereinbefore conveyed should revert to the right heirs of H. party thereto.

The title had been accepted and the draft conveyance approved when a letter was received by the purchaser's solicitors from A., one of the trustees of the hospital, intimating that as the heir-at-law of H. he had not concurred in the sale, and calling their attention to the clause in the release under which if the sale was carried out the property would revert to him.

A summons was thereupon taken out by the purchaser for a declaration that a good title to the hereditaments contracted to be sold had not been made:—

Held, that the condition was in terms and form a true common law condition, and was void as being obnoxious to the rule against perpetuities.

The dictum of Jessel M.R. in *In re Macleay*, (1875) L. R. 20 Eq. 186, and of North J. in *Dunn* v. *Flood*, (1883) 25 Ch. D. 629, discussed and followed.

The remarks in Challis on the Law of Real Property, 2nd ed. pp. 174-177 upon the question whether the rule against perpetuities applies to common law conditions in defeasance of a freehold, discussed at length and dissented from.

Held, further, that in view of the notice received from A. claiming as heir-at-law of H., and who declined to be bound by the decision, the title was not one which could be forced upon an unwilling purchaser.

In re Thackwray and Young's Contract, (1888) 40 Ch. D. 34, followed. *In re* TRUSTEES OF HOLLIS' HOSPITAL AND HAGUE'S CONTRACT
Byrne J. 540

VENDOR AND PURCHASER—*continued.*
—— Incumbrance — Private street — Improvements—Charge on premises—Date 496
See Local Government. 3.
VESTING — Will — Remoteness — Intestacy — Maintenance - - - 739
See Will. 3.
VOLUNTARY WINDING-UP — Reconstruction —Sale of assets—Dissentient member
See Company. 11. 80

WAIVER—Notice—Lease—Option to purchase —"Assigns" — Equitable assignees — Possession - - - - 261
See Landlord and Tenant. 1.
WATCHING—Besetting—Interlocutory injunction - - - - 35, 696
See Trade Union. 2, 3.
WATER — Alteration of flow of stream—Local authority — "Injuriously affecting" — Injunction - - - - 608
See Riparian Owner. 1.
—— Negligently letting loose water confined in mine - - - 233, n.
See Mine.
—— Spring — Alteration of natural flow — Injunction - - - - 360
See Riparian Owner. 2.
—— Underground water—Surface—Subsidence — Right of support — Water-logged land - - - - 217
See Support.
WAY—Right of—Lease—Parcels—Misdescription—Common mistake—Rectification
See Landlord and Tenant. 2. 309
WELL—Licence to take water from public well —Local authority - - - 360
See Riparian Owner. 2.
WIDENING STREETS—Compulsory powers — House — Taking whole — Part only required - - - - 169
See London.
WIFE.
See Husband and Wife.

WILL — *Class Gift — Gift to "A. and the Children of B." — Death of A. in Testator's Lifetime — Lapse — Survivorship — Period of Distribution.*

A testator gave property in trust for his wife (who survived him) for life, and after her death for his niece A. and the children of his sister B. who should attain twenty-one equally. At the date of the will there were living A. and five children of B., but A. died in the testator's lifetime. At the death of the tenant for life B.'s five children were still living and had all attained twenty-one:—

Held (reversing North J.), that the gift was a gift to a class, and that consequently A.'s death in the testator's lifetime had not caused a lapse of her share, but the whole gift passed to the five children as the members of the class surviving at the period of distribution.

Per Romer L.J.: A gift by will to a class, properly so called, and A. equally, so that the testator contemplates A. taking the same share that each member of the class will take, is

WILL—*continued.*
primâ facie a gift to a class. *In re* Moss. Kingsbury *v.* Walter - - - C. A. 314

2. —— *Executor — Administration — General Bequest to Persons in Succession—Absolute Gift subject to Executory Limitation—Reversionary Interest—Conversion—Enjoyment in Specie.*

The reason of the rule in *Howe* v. *Earl of Dartmouth*, (1802) 1 W. & T. 7th ed. p. 68, is not generally applicable to an absolute gift subject to an executory limitation.

By his will a testator gave all his property to his wife, and by a codicil to his will, after reciting that G. M. was the adopted daughter of himself and his wife and that he was desirous of providing for her in the event of his wife dying without issue leaving her surviving, he directed that in such event the gift in his will in favour of his wife should take effect as if the name of G. M. had been substituted therein for that of his wife. Part of the testator's estate consisted of a reversionary interest in a trust fund:—

Held, having regard to the form of the gift in the codicil, that the testator intended that the property should be enjoyed in specie, and that the reversion ought not to be sold. *In re* Bland. Miller *v.* Bland - - Stirling J. 336

3. —— *Remoteness — Intestacy — Vesting — Maintenance—Construction of Will.*

A testator bequeathed a sum of 12,000*l.* to trustees, upon trust to pay the income thereof to a daughter during her life, and after her death to pay 1000*l.* to her husband, if then living, and subject as aforesaid, as to capital and income, on trust for all the children of the daughter when they should attain twenty-five, but not before, and, if more than one, in equal shares, and in case there should not be "any such child" the fund was to form part of his residue. The testator declared that, until the 12,000*l.* should be invested, his trustees should pay to his daughter, or, in the event of her death, to her husband and children, interest on their respective portions. The testator also declared that his trustees might at their discretion raise any part or parts (not exceeding together one moiety) of the expectant share of any grandchild under his will, and apply the same for his or her advancement, &c. And the testator empowered his trustees to apply all or any part of the income arising from the expectant share of any grandchild under his will, after the death of the preceding owner for life thereof, for the maintenance and education of each such grandchild, and he directed his trustees to invest and accumulate the unapplied income in augmentation of the capital of such share.

By a codicil the testator directed his trustees to hold a moiety of the residue of his estate, real and personal, in trust to pay the income thereof to a son during his life; and after his death for his child or children absolutely upon their attaining twenty-five. And in the event of the death of either or all the son's children before attaining twenty-five, then upon trust to pay the share of the child or children so dying to another son absolutely:—

Held, that under the gift of the 12,000*l.*, and also under the gift of a moiety of the residue, the

WILL—*continued.*
grandchildren took immediate vested interests, subject to their being divested in case they did not attain twenty-five, and that the trusts were not void for remoteness.
Decision of Kekewich J. reversed.
Per Lindley M.R. and Sir F. H. Jeune, *Fox* v. *Fox*, (1875) L. R. 19 Eq. 286, approved. *In re* TURNEY. TURNEY *v.* TURNEY - C. A. 739

—— Appointment—Execution—No reference to limited power—Intention - 536
See POWER.

—— Estate duty—Incidence—Settlement not made by will but by antecedent instrument - - - - - 489
See REVENUE.

—— Executor not express trustee for next of kin—Title of heir-at-law and next of kin barred by Statute of Limitations 149
See CHARITY.

—— Leasehold—Specific bequest—Liability to pay rent and perform covenants - 54
See TENANT FOR LIFE. 2.

—— Married woman—Grant of general probate to husband—Implied assent to will 1
See HUSBAND AND WIFE. 1.

WINDING-UP OF COMPANY.
See Cases under COMPANY.

WIRES—Right to lay—Power to open street—Consent of tramway company - 282
See TELEPHONE COMPANY.

WORDS—"Agreement" - - - - 80
See COMPANY. 11.

—— "Assigns" - - - - - 261
See LANDLORD AND TENANT. 1.

—— "Author" - - - - - 749
See COPYRIGHT.

—— "Clog" - - - - - - 474
See MORTGAGE. 2.

—— "Fetter" - - - - - 474
See MORTGAGE. 2.

—— "Injuriously affecting" - - 608
See RIPARIAN OWNER. 1.

—— "Settlement" - - - - 138
See SETTLED LAND. 1.

—— "Succession" - - - - - 138
See SETTLED LAND. 1.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, STAMFORD STREET AND CHARING CROSS.

BIBL. LONDIN

DL 12 AUG 1977